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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 237.

W. L. WELLS COMPANY, PETITIONER,

vs.

GASTONIA COTTON MANUFACTURING COMPANY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

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It is submitted that the writ of certiorari should not issue in this action, as it is not such a case as is contemplated by the act of 1891, establishing the circuit court of appeals.

In the case of Forsyth *vs.* Hammond, 166 U. S., 506, Mr. Justice Brewer has carefully pointed out in what cases the writ will issue. He shows the importance of the court, and how it relieves the Supreme Court of the burden imposed upon it, in the number of cases, carried there by writ of error, or appeal.

It certainly, as we read this opinion,—so useful to the profession,—was not to be inferred, the court would grant the writ, in every case. The fact that the same is granted in so few

cases, as we see them reported, shows this court is, as Justice Brewer says, "chary of action in respect to certioraris."

In the first place, before the court will grant the writ, to the circuit court of appeals, there must be a *final judgment, or decree,* in that court, sought to be reviewed.

There is no final judgment here, as the opinion of Judge Simonton shows.

There was action to be taken in the circuit court, upon the coming down of the mandate.

On page 514 of volume 166, United States, in the Hammond case, says the Justice:

"We have declined to issue writs of certiorari, in cases where, there being only a matter of *private interest*, there had been no final judgment in the *court of appeals*."

What was the judgment? That there was no corporation, chartered under the laws of Mississippi; but if the plaintiff wished to proceed in the circuit court, it could do so by substituting the names of W. L. Wells, John T. Wells, and George Butterworth, as partners, plaintiffs in this action.

See last paragraph of opinion of Judge Simonton, printed in this brief, on page —, &c.

This is only a matter of private interest, being an action at law, to recover money on a *special contract*, as the record will show, and as this brief will, also.

So, when the case goes back to the circuit court, the question is not that judgment be entered for plaintiff or defendant; but, in the first instance, whether the plaintiff will accept the suggested amendment and go on with the merits, or go out of court.

It is plain to be seen that what the petitioner wants, is to avoid the consideration of the merits, by a jury. The record will show that Butterworth, and John T. Wells, are utterly insolvent. Also that W. L. Wells is the company, and the company, W. L. Wells (83 Fed. Rep., 570).

They allege a corporation, and when held liable, on contracts made by W. L. Wells, president, and manager, the only one solvent, petitioner contends W. L. Wells had no power to contract.

It is a rule, that "no case should go up by piecemeal."

To illustrate this rule, suppose this court should grant the writ of certiorari, and after argument, should decide to overrule and reverse the circuit court of appeals, the judgment would be, as we take it, that the mandate issue to the circuit court, there to be proceeded with, in accordance with the opinion filed by the justice. That being so, the merits of the case, in the circuit court of appeals, and in the Supreme Court, would remain unconsidered entirely, and the respondents, the defendants, deprived of their right to review the circuit court's decision, on the merits of the action. Therefore, the rule that "no case should go up by piecemeal."

We observe that the tendency of all of our courts, now, is to consider the merits of the case.

We do not deny that the Supreme Court of the United States, under the act of 1891, as said by Justice Brewer, can issue its writ of certiorari, in any case, but, in doing so, the court has marked the way,—the manner, in which it must be done.

This petitioner has not come within any rule laid down by the justice.

First. It is not a final decree of circuit court of appeals.

Second. There is no conflict between State supreme court and circuit court of appeals.

Third. There is no serious conflict between the circuit court of appeals, of one circuit, and that of another, which might bring about serious results between Federal courts of equal authority, and jurisdiction.

Fourth. "It applies to every case in which, but for it, the decision of the circuit court of appeals would be *absolutely final*" (page 513, 166 U. S.).

We have shown the decision of the circuit court of appeals in this instance is not final (*ante*).

Fifth. It does not apply to cases of private interest, unless the judgment is *absolutely final.*

Sixth. There is no matter affecting the nation, in its internal or external relations, involved in this case.

In the next place, we must observe that the petition was not drawn, in this case, in the light of the rules as laid down in Forsyth against Hammond, 166 U. S. R.

Another thing we notice; the fact that the petitioner assumes virtually the proposition he is trying to maintain.

Our argument is made upon the presumption that we are trying the question, or issues, one and two, as upon a plea in abatement, and Judge Simonton's opinion so treats it. The merits of the case are not involved in those issues, but only the question whether there was a corporation. The only evidence upon these issues the court will find on page 1 to 15, etc., in brief hereto attached; also in Judge Simonton's opinion. We suppose the record will constitute a part of the record the petitioner will file.

We call particular attention to the opinion of Judge Simonton, which we also assume will be printed as a part of the record, and is a part of this brief.

Again, in further comment upon this case of Hammond, 166 U. S., 506, it is submitted, that this court, speaking of the power, under the act creating the circuit courts of appeal to bring before it for review the action of those courts, says:

"Obviously a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it

was the intention of Congress to terminate in courts of appeal, and which, brought here, would simply prevent that promptness of decision which, in all judicial actions, is one of the elements of justice."

And, in the same case, on page 513, it is said that,

"While this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interest of the nation, in its internal or external relations, demands such exercise."

Moreover, a case cannot be removed by writ of certiorari from the circuit court of appeals to this court, except in cases where the judgment of that court was a final one.

Chicago & N. W. Ry. Co. *vs.* John Osbourne, 146 U. S., 355.

It is therefore to be inquired whether this case is of such a nature as to bring it within the rule laid down in Forsythe *vs.* Hammond, *supra*, and, if so, whether or not the judgment of the circuit court of appeals was final.

It appears, both from the petition and from the brief of counsel for the petitioner, that no matter affecting the interest of the nation or its internal or external relations, demands the exercise of the power of the court, nor does our case involve the necessity of avoiding a conflict between the circuit courts of appeal and the courts of a State.

The court must, therefore, be appealed to to exercise this power, because either of the "importance of the question or the necessity to avoid conflict between two or more courts of appeal."

1. The importance of the question involved does not require the issuing of the writ, as will appear, we think, from the following statement: "The title of the action, as instituted in the circuit court of the United States is W. L. Wells Company *vs.* Gastonia Manufacturing Company."

In the summons it is said that the plaintiff, W. L. Wells Company, is a citizen and resident of the State of Mississippi. This averment was made in order that it might appear that the said circuit court had jurisdiction of the action.

In the complaint filed (Record, p. 3), it was alleged that the plaintiff was a corporation created and duly organized under the laws of the State of Mississippi. This allegation of the complaint was made that it might appear therefrom that the court had jurisdiction of the action, and that the plaintiff had power to make the contract set out in the pleading, and to enforce that contract in that court.

The defendant, in its answer, (Record, p. 7) denied, in terms conforming to the rules of pleading in North Carolina, that the plaintiff was a corporation duly created and organized under the laws of the State of Mississippi.

This allegation, on the part of the plaintiff, and denied, on the part of the defendant, raised an issue of fact, which the court proposed to submit to the jury for its determination.

The issue appears on page 10 of the Record: "(1) Is plaintiff a corporation, as alleged in the complaint?" (2) "Is plaintiff a resident and citizen of the State of Mississippi?"

The burden of proving the affirmative of these issues was assumed on the trial by the plaintiff, it having made no objection whatever to the same.

In the attempt of the counsel representing the plaintiff to prove their client was a corporation, duly created and organized under the laws of the State of Mississippi, and a resident and citizen of that State, it was shown that three citizens of the State of Mississippi, to wit: W. L. Wells, a man of considerable means, and John Wells and one But-

terworth, had applied to the State of Mississippi for a charter of a corporation to be called the W. L. Wells Company; that the State of Mississippi, through its governor, after the submission of certain questions to the attorney general of that State, as the statute required, granted to those individuals the right to form a corporation and commence business under that name, whenever $10,000 of stock had been *subscribed for and paid.*

It was further discovered, in the examination of the plaintiff's witness, that, while $10,000 had been subscribed to the capital stock, *no part of that sum had been paid* into the treasury of the company, unless the payment of that sum was to be inferred from the fact that these individuals, assuming to do business under the name of the Wells Company, had earned in the business thus conducted profits exceeding $10,000.

It is sufficient here to say that his honor, Judge Boyd, who tried the case in the circuit court, ruled that the evidence was sufficient to prove the payment of the $10,000, and that, therefore, the condition imposed upon these individuals had been fulfilled, and therefore, of course, the creation of the legal entity by the State of Mississippi was complete, and the Wells Company was a corporation *de jure* of that State.

From this ruling of Judge Boyd it followed that the plaintiff was entitled to enforce the contracts made with it in that court, it being, because of its creation and organization under the law of the State of Mississippi, a citizen and resident of that State.

When the case was taken from the circuit court to the circuit court of appeals, by writ of error, one of the numerous questions to be decided was this: Whether or not, the evidence proved the payment of the $10,000, which the so-called charter stated should be paid before the proposed corporation commenced business.

Judge Boyd held that the payment was proved. The circuit court of appeals held that the payment was not proved. The evidence upon this point was not contradictory.

Another question that was to be decided was this one: Whether, if the $10,000 spoken of in the charter had never in fact been paid, the Wells Company was a corporation, duly created and organized under the laws of the State of Mississippi, and therefore a citizen and resident of that State, and the circuit court of appeals held that, being of the opinion that the $10,000 spoken of, had never been paid, and that the payment of that sum into the treasury was a *condition precedent to the commencement by these individuals of business as a corporation*, it followed that the Wells Company was not a corporation, duly created and organized under the laws of the State of Mississippi and a citizen and resident of that State, and therefore it followed that the circuit court had no jurisdiction of the action, and the plaintiff, whatever might be its rights in some other tribunal, because of the fact that it was doing business in the State of Mississippi and assuming to act as a corporation, could not, in the circuit court of the United States, enforce such rights, because it had failed to show such residence and such citizenship diverse from that of the defendant, as entitled it to invoke the jurisdiction of the circuit court of the United States for the western district of North Carolina in the enforcement of its contract with a citizen of the State of North Carolina.

Now, we respectfully submit that there is no such importance to be attached to the decision of the circuit court of appeals, as to require of this court the exercise of that power which it has said should be sparingly exercised, because it might burden the docket of this court with cases which it was the intention of Congress to terminate in the courts of appeal.

Cases involving private contracts are not "important" within the purview of that decision of this court. To be worthy of a standing in that category, the case must involve more than mere dollars and cents. It must involve the decision of some important principle of law, the wrong es-

tablishment of which, would work harm in the general jurisprudence of the country.

But, it is insisted by the petitioner that the decision of the circuit court of appeals is in conflict with that of other circuit courts of appeal upon the same point, and in conflict, also, with the decision of this court upon the point in controversy, and that because it produces a "conflict between two or more courts of appeal," the writ should issue.

It is, therefore, now to be inquired whether the decision of the circuit court of appeals as announced in the opinion filed by Judge Simonton, and made a part of this brief, is in conflict with the decisions of other circuit courts of appeal, and with the decisions of this court upon the point involved.

Here let it be noted, that the statement contained in the petitioner's brief, that "it is conceded in the opinion of the circuit court of appeals that the plaintiff is at least a *de facto* corporation," is not correct; nor is it true, as in that brief stated, that it is admitted on all sides, that the plaintiff is at least a *de facto* corporation. What the plaintiffs in error in the circuit court of appeals insisted upon, and what that court decided, is so fully and carefully set out in the opinion of Judge Simonton, that we hesitate to trouble this court with any attempted explanation of that opinion.

It will be found, upon examination, that the circuit court of appeals declared, it was manifest, from the record evidence in the case, that the State of Mississippi intended to impose, and did impose, upon the individuals seeking at its hands the right to do business as a corporation under the name of the Wells Company, a condition precedent, to wit: that they should not only subscribe for, but *actually pay* into the treasury of the company, the sum of $10,000, before commencing business.

The circuit court of appeals held further that the evidence disclosed the fact that that payment had never been made, but that these individuals, knowing, of course, the condition that the State of Mississippi had prescribed; knowing that

they had not complied therewith, without stock or stockholders, without a seal; without doing any one of those things, which indicate corporate life and activity, did business under the name of the Wells Company in fraud of the law.

The circuit court of appeals decided that, these facts being admitted, the Wells Company was not a *de jure* corporation; that it was not what it alleged in the summons it was, to wit, a citizen and resident of the State of Mississippi, and that it was not, as it alleged in the first section of its complaint, a corporation duly created and organized under the law of that State.

The authorities upon which the circuit court of appeals, through Judge Simonton, put this decision, are set out in the opinion, to which we respectfully refer this court, and to the brief of the plaintiff in error in that court, printed as a part of this one.

We may assume, we think, that no cases can be found which show that this decision of the circuit court of appeals is in conflict with the decision of other circuit courts of appeal, or with the decisions of this court, except those cases which have been found by the diligent counsel and have been set out in the brief. We will therefore consider those cases seriatim.

The first case cited is that of Tulare Irrigation Co. *vs.* Shepard, 185 U. S., 1.

In that case the defendant corporation sought to escape its liability on bonds issued by it upon the ground that its organization had not been regularly and completely consummated.

The court decided that it did not lie in the mouth of the defendant, who had received benefit from the sale of the bonds and which had *bona fide* endeavored to be organized according to law, to deny its own liability as a corporation, in order to escape from the obligation which it had assumed and for which it had received benefit.

That is not our case. Here the court has found that the attempted organization was not *bona fide*, and, moreover, that the effort of the Wells Company was to escape its just liability by taking advantage of its own wrong in organizing, *mala fide* and contrary to the amendatory provision of law.

The next case cited is that of Baltimore and B. T. Co. *vs.* The Fifth Baptist Church, 137 U. S., 658.

In that case the defendant sought to escape its liability to the plaintiff by pleading that the plaintiff was not duly and properly organized as a corporation. There, too, it was declared that the individuals who represented this organizing entity, having acted in good faith in their attempt to organize, and having been treated as a valid corporation, it did not lie in the mouth of the defendant to say they were not. There was no finding in that case, as in ours, that the omission was in the not performing an amendatory condition of the incorporating law, and that the omission, if any, was not in fraud of the law.

In the case of Stout *vs.* Zulic, 48 N. J. Law, 4899, the omission consisted of the failure to file certain certificates, and was not, as in our case, the failure to do some essential act, without the doing of which business was not to be commenced.

In the charter there under discussion there was no such provision as is contained in that which is under discussion in our case. A reference to this decision will show that, in the opinion filed, the court distinguished that case from the case of Hill *vs.* Beech, 12 N. J. Eq., 31, saying that, in this latter case, it was properly held that the defendants were liable as partners, upon the ground that they were not a corporation, and "the chancellor saying that they were not a domestic corporation and could not be sued as such, and that they were not a foreign corporation, for it was perfectly manifest, upon the face of their proceedings, that their at-

tempted organization, under the general law of New York, was a fraud upon that law."

Therefore, in the case last cited, those individuals who claimed to be a corporation under the general law of New York were held liable because they had attempted a "fraud upon the law," and, in our case, Judge Simonton says that the Wells Company is not a corporation, and that the members of it cannot masquerade as such, because they have attempted, evidently, a fraud upon the law of the State of Mississippi.

And in the next case cited, Trustees *vs.* Froisly, 37 Minn., 437, the omission was that of an informality or irregularity, and not, as in our case, the omission of a mandatory and essential act.

The opinion of the circuit court of appeals follows:

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

GASTONIA COTTON MANUFACTURING COMPANY, *Plaintiff in Error,*
versus
W. L. WELLS COMPANY, *Defendant in Error.*
} No. 469.

In error to the circuit court of the United States for the western district of North Carolina, at Charlotte, N. C.

(Argued Nov. 23, 1903; decided Feb. 2, 1904.)

Before Goff and Simonton, circuit judges, and McDowell, district judge.

Charles Price and Armistead Burwell for plaintiff in error, and Murray F. Smith and Charles W. Tillett for defendant in error.

SIMONTON, *Circuit Judge:*

This case comes up by writ of error to the circuit court of the United States for the western district of North Carolina. The action was brought in the court below in the name of the W. L. Wells Company against the Gastonia Cotton Manufacturing Company on a money demand for $35,967.60. The complaint, in its first paragraph, setting out the jurisdiction of the court, alleges that the plaintiff is a corporation created and duly organized under the laws of the State of Mississippi, and is a citizen and resident of the State of Mississippi; and the defendant is a corporation under the laws of North Carolina. The defendant, in the first paragraph of its answer, admits its own corporate character under the laws of North Carolina, but adds: "It has no knowledge or information sufficient to found a belief as to the truth of the allegation contained in the first section of the complaint, to wit: that the plaintiff is a corporation organized under the laws of the State of Mississippi, and a citizen and resident of that State, and, therefore, it denies the said allegation." This is strictly in accordance with Code pleading and practice

which prevails in North Carolina. Under this system of pleading there are two modes of defence to a complaint, demurrer and answer. So this defence set up here, which ordinarily would be made by plea in abatement, is properly made in the answer (Code of Procedure of North Carolina, section 240). So when the case was heard before the jury, the court below in formulating the issues put as the first two, these:

"1st. Is plaintiff a corporation as alleged in the complaint.

"2nd. Is plaintiff a citizen of the State of Mississippi."

These issues are practically one and the same. Having formulated the issues, the court directed the jury to find them in the affirmative. The issues presented, as will be seen hereafter, were both issues of law.

The jury having found for the plaintiff on all the issues under instructions, a writ of error was allowed, and the case is here on assignments of error. The first five go to the instructions of the court on the first and second issues.

The burden of proof on these issues being on the plaintiff below, these facts appeared:

W. L. Wells was dealing in cotton in the State of Mississippi, and conducted a large business, among others with the defendants below. In 1898 a charter was applied for by him, John T. Wells and George Butterworth, for an incorporation under the name of the W. L. Wells Company. Charters in Mississippi are granted under general laws. An application is made to the governor for a charter. He refers the proposed charter to the attorney general, and upon his certificate that it is not violative of the constitution and laws of Mississippi, the governor approves it and causes the great seal to be affixed to it. In the present case the following form of charter was submitted to the governor of Mississippi, and by him referred to the attorney general 26th April, 1898.

"SECTION 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract, and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"SECTION 2. The capital stock of said corporation shall be

fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

"SECTION 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and, generally, may have all powers conferred by chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"SECTION 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the honorable attorney general for his advice as to the constitutionality and legality of the provisions thereof.

"A. J. McLAURIN, *Governor.*

"JACKSON, MISS., *April 26th*, 1898."

"The provisions of the foregoing proposed charter of incorporation are not violative of the constitution or laws of the State.

"WILEY N. NASH,
"*Attorney General.*

"JACKSON, MISS., *April* —, 1898."

'Executive office (State coat of arms), Jackson, Mississippi.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

Great Seal of the State of Mississippi.

"In testimony whereof, I have hereunto set my hand and caused the great seal of the State of Mississippi to be affixed this 1st day of June, 1898.

"By the governor: A. J. McLAURIN.

"J. L. POWER,
Secretary of State."

"Office of Secretary of State, Jackson, Mississippi.

"I, J. L. Power, secretary of state, do certify that the charter hereto attached, incorporating the W. L. Wells Company, was, pursuant to the provisions of chapter 25 of the Annotated Code, 1892, recorded in the Book of Incorporations in this office.

Great Seal of the State of Mississippi.

"Given under my hand and the great seal of Mississippi hereunto affixed this 1st day of June, 1898.

"J. L. POWER,
"*Secretary of State.*"

The attorney general gave his certificate in favor of the constitutionality of the proposed charter on — day of April, 1898. And on 1st day of June, 1898, the governor caused the great seal of the State to be put to the charter. The act under which the governor approved this charter declares: "The powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified."

It will be noted that the second section of this charter fixed the terms and mode in which it would get life, could act as a corporation. "The capital stock of said corporation shall be $50,000, divided into shares of $500, each, and as soon as $10,000 of said stock is subscribed and paid for, said corporation shall have power to do business."

The governor having sealed the charter, the incorporators met on 18 July, 1898, read over and adopted it. Books of subscription were then opened and W. L. Wells subscribed for ten shares, John T. Wells for five shares and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells and George Butterworth were elected directors. The meeting thereupon adjourned and the record does not disclose whether they ever met again or not. John T. Wells, who was secretary and treasurer of the company, says that when the stock was subscribed for nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth and so did W. L. Wells. Yet he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder,

no stock certificates ever issued. He goes on to say that he never paid any cash into the Wells Company, nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with. That, notwithstanding, he drew out $10,217.55, and Butterworth took $9,022.65. Both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that having a charter like this conditioned upon the payment of $10,000 in subscriptions, then these men undertook to exercise powers in the charter, without fulfilling or attempting to fulfill the conditions precedent in the charter. That even when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, contracted obligations in the name of the so-called corporation which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law. And that Wells Company had never and could not have any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with. In Beach on Private Corporations, section 12 (p. 18), we find: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any forum in which the fact of incorporation can properly be called in question." The same learned author, at p. 27, says: "It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate." This seems to be in accordance with the law in Mississippi. In *Perkins vs. Sanders*, 56 Miss., 733, the su-

preme court of that State says: "In charters which are mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and, of course, no corporate act can be performed till these conditions have been complied with. In all such cases when a certain amount is named in the charter as necessary to be subscribed as the capital stock" (in the case at bar it must be subscribed and paid in) "such subscription" (and of course such payment) "is regarded as condition precedent to the existence of the corporation, unless otherwise provided in the charter." Discussing the broad distinction between a charter which creates a corporation, and invests it at once with corporate powers, and that class of corporations created under general laws requiring an application for a charter, the same court says: "The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere provision on the part of the legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and as a necessary result no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter, and to those acts it would be considered that the corporation had existence before its full investure with its corporate franchise."

It is contended, however, that the plaintiff, if it be not a corporation *de jure* is a corporation *de facto*, and will be so recognized. That, at least, the defendants having dealt with it as a corporation, are now estopped from denying its existence as a corporation. It must be borne in mind that the question we are now considering is not the relative rights of the plaintiff in error and of the defendant in error. The former may be estopped by its acts. We are dealing with a question of the jurisdiction of this court, a question which the court must always take up, *suo motu*, if necessary, the question being at the threshold of every case before it. (*Metcalf vs. Watertown*, 128 U. S., 586.)

The presumption is always against the jurisdiction of the circuit court unless the contrary affirmatively appears. (*Grace vs. Am. Cent. Ins. Co.*, 109 U. S., 278.) Its jurisdiction does not depend upon the consent of parties actually made or constructively implied by estoppel. The jurisdiction is

statutory and must follow the statute. When a corporation sues in that court, claiming jurisdiction through diversity of citizenship, it can maintain jurisdiction only by showing that it is the creation of the State of which it claims to be a corporation, and that it is really a corporation. Otherwise it is not a legal entity, a person in the eye of the law. "A corporation cannot for the purpose of jurisdiction in Federal courts be considered a citizen, or a resident, of a State in which it has not been incorporated." (*Southern Pacific Co. vs. Denton*, 146 U. S., 203.) When a complainant comes into the circuit court of the United States as a complainant and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself, and show the credentials of its birth and existence. The fact that as to certain persons and in certain transactions it may be a corporation *de facto* is not enough.

The defendant in error relies with full confidence upon the case of *Tulare Irrigation District vs. Shepard*, 185 U. S., 1. That was an action brought in the circuit court of the United States for the district of California by plaintiff against the Tulare Irrigation District, a public municipal corporation of the State of California. This district had issued coupon bonds for the purposes of their work, had floated them in the market, and plaintiff had become a *bona fide* purchaser for value. The coupons being matured, payment was refused and this suit was brought. The defence set up was on certain irregularities in forming the corporation. The act under which the corporation was created required that a petition for the organization of an irrigation district be presented to the supervisors of the county signed by the required number of freeholders. Before the petition was presented the act required that it be published in some newspaper at least two weeks before its presentation, "together with a notice stating the time of the meeting at which the same will be presented." In that case the petition was properly prepared and signed. The petition with the signatures was published in the proper newspaper together with the notice, but the signatures attached to the petition were not reproduced after the notice. All of the public signatures and notice were published in the same column and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column above and another across the column below this publication. This was charged as a

fatal defect, and the bonds were claimed to be invalid. The opinion of the Supreme Court strikes the keynote of the decision in the opening sentences: "It is agreed in the statement of facts of this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and while acting as a corporation at all times, still sets up that it never was legally organized, and hence had no legal right to issue any bonds." In the case of *Douglas County Commissioners vs. Bolles*, 94 U. S., 104, the court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by lapse of time, and we think applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed." This idea dominated the decision. It is evident from the opinion that the court thought the defendant a corporation *de jure*. But in the argument, assuming that there were irregularities, the court held that inasmuch as it attempted to organize under a general law, and that it actually used the franchise, and continued to act in every respect as a corporation, it could not deny its corporate existence so as to defeat its obligations. Indeed, had any other conclusion been reached, a fraud would have been sustained. The distinction between that case and the one at bar is broad and distinct. In the latter case the plaintiff below went into the circuit court claiming the jurisdiction because, and only because, it was a corporation, resident in a State other than the defendant. It was bound to prove its claim. In doing so it did not prove a *bona fide* attempt to fulfill the conditions of its incorporation. On the contrary, there is no evidence whatever of its use of the corporate franchise. It had no certificates of stock, no corporate capital, no declaration of dividends, and, as far as the record discloses, no corporate meeting after the first. Nor, as will be seen hereafter, will the ends of justice be defeated if it be not treated as a corporation.

In *Baltimore & Potomac R. R. Co. vs. Fifth Baptist Church*, 137 U. S., 568, the point now under discussion could not arise as the jurisdiction was not involved. *Shapleigh vs. San Angelo*, 167 U. S., 646, simply decides that a State, being creator of a municipal corporation, is the proper party to impeach the validity of its creation, and if the State acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked.

It will be noticed that in all the cases in which suits by or against *de facto* corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked. In the case before us there is no collateral attack. The plaintiff below itself put that question directly in issue.

In our opinion, the plaintiff below, defendant in error here, failed to establish its first allegation as to its corporate capacity, and that the court below erred in instructing the jury to find the issues in this regard in its favor.

This conclusion renders unnecessary any discussion of the other assignments of error.

The conclusion reached will not defeat the ends of justice, if the claim of the defendant in error be good. It is competent for the persons claiming to be incorporators to carry on the suit in their own names, and as they have requisite citizenship the suit can be maintained in the Federal court. *Jones vs. Aspen Hardware Co.*, 29 L. R. A., 143.

It is ordered that the judgment of the circuit court be reversed. That this cause be remanded to that court, and if the plaintiffs below, defendants in error here, be so advised as to continue the suit in that court, that they be allowed to amend their complaint by inserting their individual names as plaintiffs, and that, thereupon, a new trial be granted. If, however, they decline to do this, that the suit be dismissed without prejudice.

Reversed.

Here follows in full our brief in the United States circuit court of appeals:

CIRCUIT COURT OF APPEALS, NOVEMBER TERM, 1902.

GASTONIA COTTON MANUFACTURING COMPANY, *Plaintiff in Error,*
vs.
W. L. WELLS COMPANY, *Defendant in Error.*
No. 469.

STATEMENT OF THE CASE.

In support of the contentions of the plaintiff in error, we submit the following:

The W. L. Wells Company, alleging that it was a corporation, duly created and organized under the laws of the State of Mississippi, brought two actions in the circuit court of the United States, at Charlotte, North Carolina; one against the Gastonia Cotton Manufacturing Company, and the other against the Avon Mills.

It was agreed that these cases should be consolidated for trial, because it was known by counsel, the matter involved in the two actions constituted, really, one transaction.

These actions are founded on *special contracts, alleged in the complaints*, to have been entered into between the plaintiff corporation, and the two defendants, corporations, by the terms of which each of the defendants bought from the plaintiff a certain number of pounds of baled cotton, of a certain grade, and at prices fixed by the contracts.

In the action against the Gastonia Cotton Manufacturing Company, the complaint averred the sale and delivery of cotton, under the contract, to the amount of $111,365.59, of which only $75,967.60 had been paid, leaving a balance due of $35,397.99.

In the action against the Avon Mills, the complaint alleged the sale and delivery of cotton, *under the contract*, to the amount of $136,777.11, of which only $110,026.75 had been paid, leaving a balance due of $26,750.36.

These two balances, thus claimed, by plaintiff, amount to $62,148.35, principal money.

The defendants, admitting they received all the cotton, mentioned in the complaint, and that they had agreed to pay therefor in a certain manner the price set out in the said complaint, insisted, they were entitled to have, on a final settlement, a further credit, on the consolidated account, of $50,000.00, to wit: $10,000.00 on or about the 1st of August, 1900, and $40,000.00 in January, 1901.

His honor ruled, that, inasmuch as the *contract for the purchase* of the cotton, was admitted, as set out in the second paragraph of the answer, and also, that the cotton had been received, the burden of proving the right to have a further credit of $50,000.00, as above stated, rested on the defendants.

He also ruled, that, the fact, alleged in the first paragraph of the complaint, to wit: that, the plaintiff was a corporation, duly created and organized under the laws of the State of Mississippi, being denied, in the answer, the burden of proving the truth of that allegation rested upon the plaintiff.

The issues which appear in the record were submitted by the plaintiff, and, without exception, adopted by the court; and, the trial proceeded, upon the issues under the rulings of his honor, stated above.

The plaintiff, assuming the burden of proving the fact, that it was a corporation, duly created, and organized, under the laws of the State of Mississippi, introduced in evidence, the certificates, etc., which appear on pages 40, 41, 42, 43, 44 and 45 of the record.

It appears that the power granted, by the State of Mississippi, to W. L. Wells, John T. Wells and Geo. Butterworth, to become a corporation, under the name and style of the W. L. Wells Company, was, as we submit, coupled with a condition.

Section 2 of the charter (R., 42) is as follows:

"The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each; and, as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business" (page 42 of Printed Record).

The plaintiff, in its effort to establish the affirmative of the first issue, then introduced the record of the meeting of the incorporators, and the record of the meeting of the stockholders.

This appears on pages 45, 46 and 47 of the Record, and that exhibit (No. 3) is the only record ever made, of any meeting of the incorporators, or the stockholders, or the directors.

The plaintiff introduced as a witness J. T. WELLS, who said that he was secretary and treasurer of the plaintiff company, and was asked these questions (R., 20):

Q. "When was the capital stock subscribed by W. L. Wells, yourself and Mr. Butterworth paid in?"
A. "Out of the profits of the first year's business."
Q. "When?"
A. "Early part of 1899."

Nothing else was said by him on his direct examination about the payment of the capital stock required by the charter. But, on his cross-examination, he testified as follows:

Q. "How many meetings did you have?"
A. "Several."
Q. "Where?"
A. "Vicksburg."
Q. "Who was present?"
A. "W. L. Wells and I, and other times, W. L. Wells and myself, and Mr. Butterworth."
Q. "Where are the proceedings of these meetings?"
A. "We didn't keep them. No record of them."
Q. "How many shares did you subscribe for?"

A. "Five shares, amounting to $2,500.00."
Q. "Did you pay for them?"
A. "Yes, out of my profits of the first year."
Q. "Where is it charged on the books?"
A. "It is not charged on the books."
Q. "Any check?"
A. "No, sir."
Q. "How was it paid?"
A. "My part of the profits of the concern."
Q. "If it is not charged, it has never been paid?"
A. "Yes, sir; it has."
Q. "It was paid from the profits of the first year. Is that the best answer you can make? How much did you pay?"
A. "I appropriated that much, $2,500.00."
Q. "Show the entry on the books."
A. "There is no entry. It is the profits of the concern."
Q. "Where is the evidence that you paid it?"
A. "I have offered as full explanation as I can."
Q. "Where is the evidence of the profits?"
A. "On the books."
Q. "Show them on the books?"
A. "It would take some time to get a trial balance of the books. If you want it, I can produce it in court in the morning."
Q. "When did you pay in the stock?"
A. "Out of the profits of the first year."
Q. "If you didn't do that, you have never paid for it?"
A. "No, sir."
Q. "When did Mr. Butterworth pay for it?"
A. "In the same way I did."
Q. "How did W. L. Wells?"
A. "In the same manner."
Q. "Where is it charged to him?"
A. "It is not charged to him."
Q. "No stock ledger or certificate?"
A. "No, sir."
Q. "No records of any meeting except what has been produced in evidence?"
A. "That is all."
Q. "Who were present at these meetings?"
A. "W. L. Wells and myself."

Q. "Any dividends declared?"
A. "No, sir."

And, further, on page 28, he testified:

Q. "I understood you to say, yesterday, that you had put nothing in the W. L. Wells Co.?"
A. "I haven't paid cash in there."
Q. "How much have you taken out of W. L. Wells Co. according to your books?"
A. "$10,217.55."

And he further testified (R., 29):

Q. "Who did furnish all the capital of the W. L. Wells Company?"
A. "There was absolutely no capital to start with."

He further testified (R., 29) as follows:

Q. "What was your salary as secretary and treasurer?"
A. "We drew no salaries."
Q. "What was your compensation to be?"
A. "One-fourth of the net profits."
Q. "What was the salary of the vice-president?"
A. "Nothing."
Q. "What was his compensation to be?"
A. "One-fourth of the profits."
Q. "What was the salary of the president?"
A. "Nothing."
Q. "What was he to receive?"
A. "He was to receive his proportion of the profits."
Q. "Was he allowed interest on the capital which he furnished the company?"
A. "No, sir; he didn't furnish any capital. He loaned them some money."

The above extracts from the testimony of the witness, John T. Wells, and from the charter offered to W. L. Wells, John T. Wells and George Butterworth, by the State of Mississippi, are all the evidence, bearing upon the contention of the defendants, to wit: that the plaintiff is not a cor-

poration, duly created and organized under the laws of the State of Mississippi, and, therefore, not entitled to bring its actions in the Federal court, and their further contention, that this evidence discloses the fact, that the W. L. Wells Company, considered as a corporation, had no power to make the contracts, set out in the complaint, and that those contracts, if made, as alleged, cannot be enforced, in any court in the name of the corporation, which W. L. Wells, John T. Wells and George Butterworth proposed to form, and which the State of Mississippi gave them permission to organize, and, under that organization, to contract, only when they had paid into the treasury the sum of ten thousand dollars, in cash.

The testimony of John T. Wells, quoted above, not being contradicted, the court ruled that the $10,000.00 required to be paid in before business was begun, *had actually been paid*, and instructed the jury to answer the first issue in the affirmative; that is to say, he declared, by that ruling, *the plaintiff was a corporation*, duly created and organized under the laws of the State of Mississippi; and, as such, had power to make, and therefore, the right to enforce the contract set out in the pleadings.

We submit the testimony of John T. Wells, taken to be true in every particular, shows the following facts, and nothing more:

(1.) That, at the meeting of the incorporators $10,000.00 of the stock was subscribed for, but was not paid in.

(2.) That the company, professing to act as a corporation, began business when not one dollar of capital stock had been paid in.

(3.) That the net profits of the business exceeded $10,000, and, if there had been a corporation, that corporation had earned a sum sufficient, if dividends had been declared, to pay to each stockholder more than his subscription for stock.

(4.) That no dividend was ever made, nor was any distribution of these profits ever agreed upon, and that what the witness meant by saying the stock had been paid for was only this, that he had money enough in the concern to pay for his stock.

(5.) That no stock was ever issued.

(6.) That no stock book was ever kept.

(7.) That the three individuals began and continued the business upon an agreement that W. L. Wells should have half of the profits, John T. Wells one-fourth of the profits, and George Butterworth one-fourth of the profits, and that neither one of them should draw any salary.

We submit that the conclusion to be drawn from these facts is not the conclusion which the court drew, "that the defendant was a corporation, duly created and organized under the laws of the State of Mississippi;" but these facts, to wit: that these three individuals failed to conform to the law which authorized them to assume the functions of a corporation, and that, with full knowledge that they had so failed, they carried on the business under the name of W. L. Wells Co., did not make this association a corporation, *de jure* or *de facto*, but a partnership, and that while they, as such association or partnership, could enforce contracts made with one or more of them under the name of W. L. Wells Company, the actions to enforce such contracts must be brought by them as *individuals*, trading under the name of the W. L. Wells Company, and not in the name of a corporation, which never existed, or, if it existed in an embryonic state, was forbidden to do business because the incorporators had failed to do that which alone could give vitality to the legal entity.

The contention of the defendant is:

1. That the W. L. Wells Company is not a *de jure* corporation of the State of Mississippi; and, therefore, the circuit court of the United States had no jurisdiction of its

actions brought against the defendants, corporations of the State of North Carolina; and the court should have declared upon the evidence bearing upon the first issue, that the plaintiff had failed to establish the affirmative thereof, the same being a jurisdictional fact; and, the court had, therefore, no jurisdiction over the actions.

2. The defendant's further contention upon the first issue is, that if the paying in of the ten thousand dollars of stock was not a condition precedent to the actual existence of this corporation under the laws of the State of Mississippi, yet, the provision in the charter, that the corporation might begin business *when that amount of stock was subscribed for and paid in*, was a prohibition imposed by the State of Mississippi upon the incorporators, forbidding them to make *any* contract or do *any business until that capital was actually paid in*. If that be true, it would seem to follow that no contract made by these three individuals or any one or more of them, in the name of this corporation, can be enforced as a corporate contract in a court.

To hold otherwise would be to declare that the provisions of the charter had no force and effect whatever, except to enable the State of Mississippi, by proper proceedings, to destroy the life which it had expressly said should not exercise its functions *until this thing was done.*

We submit the provision is a wise one, intended to protect not the *State*, which authorizes the existence of the corporation, but the *public*, and those dealing with it as a corporation.

We respectfully submit the facts testified to by John T. Wells, the only witness who has anything to say about this matter, clearly show that this stock, $10,000.00, has not been paid as the law requires payment.

If the association of W. L. Wells, John T. Wells and George Butterworth, was that of stockholders and officers of

a corporation of the State of Mississippi, then the earnings belong to the corporation and not to the individual stockholders. Therefore the individuals who owned the corporation for stock subscribed for could not appropriate any part of this surplus to the payment of their individual liabilities to the corporation until the corporate body had declared dividends; and those dividends, having become the property of the individuals, had been by the individuals applied to the extinguishment of their several liabilities.

In this case, no stock was ever issued, no dividends declared, or paid, no appropriation made, either by the corporation or by the individuals, of these profits and if they exist today, they are still the profits of a business enterprise, either a corporation or a copartnership, and do not belong to the individuals.

This position we insist does not militate against the right of W. L. Wells, John T. Wells and George Butterworth, as partners or joint contractors, to enforce the contracts set out in the pleadings.

Our contention amounts to this and this only:

We insist that these three individuals, assuming to act as a corporation, in the face of the provision of the charter that they should not *commence business until they had paid in ten thousand dollars of capital*, cannot escape the effect of the contracts, made by one of their number in behalf of himself and his associates, by claiming a corporate existence which they were forbidden to assume.

It may be said in this connection, and is, indeed, so maintained by the court in the opinion filed, that the documents introduced in evidence showed that the defendants dealt with the Wells Company, knowing that it claimed to be incorporated, and that, therefore, the defendants are estopped to deny its corporate existence.

This estoppel, if it existed, would not, we submit, have any application to the *first* issue, so far as it involves the jurisdiction of the court. The Federal court, we submit,

cannot acquire jurisdiction of plaintiffs' cause by reason of any estoppel working on the defendant.

This question of the jurisdiction of the court is raised as by plea in abatement. But for the Code practice which obtains in North Carolina, and requires the question raised in this form, pleas in abatement would have been filed by the defendants. In this Code practice there is no plea in abatement as such. The substance of that plea is involved in a simple denial under the Code of the existence of the jurisdictional fact. Therefore, as said above, there is no estoppel.

In this connection, we further submit that no plea or special averment is now required under any system of pleading or procedure in order to raise the question of jurisdiction, because of the change which has been made in the law in that respect by judiciary act of 1875, amended in 1887, as will appear hereafter in the argument upon the law of the case.

We submit, however, that, under the authorities, the W. L. Wells Company was not a *de facto* corporation.

They, we think, are uniform, to the effect, that, there can be no *de facto* corporation, when the individuals, assuming to act in a corporate capacity, do not act *bona fide* in assuming that character.

Good faith is the necessary support of a *de facto* corporation.

Here, the three individuals who, without capital and, therefore, contrary to the law of their corporate existence, took upon themselves, the name of a corporation, and assumed to act as such, and thus, to escape individual liability for their acts, could not, we submit, have been acting in good faith.

The record discloses, we respectfully submit, a violation of the law, and a disregard of the safeguards thrown by the State of Mississippi around its permission to form a corporation, and the evidence discloses, we think, not only a lack of

good faith, but the perpetration of a legal fraud, as it has been denominated. It may not be amiss for the defendants' counsel to state in this brief, that upon the argument before his honor, *the defendants proposed that an amendment should be allowed, so that the individuals composing the partnership should be permitted to carry on this litigation as partners*, by amending their complaints, and alleging that they were partners, and citizens, of the State of Mississippi, the object of the counsel being to secure a trial of the actions *upon their real merits*.

We respectfully submit, upon the evidence, uncontradicted, the court should have ruled that the Wells Company, *as a corporation*, could not maintain these actions.

We call the attention of the court to the suggestion contained in the case of Jones *vs.* Aspen Hdwr. Co., 29 L. R. A., 143, to-wit, that the individuals who had assumed to act as a corporation, in contravention of the law, could have asked, when the facts were fully disclosed, to amend their pleadings and assert their rights *under the contracts* as individual citizens of the State of Mississippi, doing business under the name of the W. L. Wells Company.

His honor, in his opinion, filed after the trial of the case and after the bill of exceptions had been signed, suggested that the effort of the defendants, was, to escape liability in these actions, on a technicality.

In the light of all the evidence, this court will see that the effort of the defendants, was not to escape liability to W. L. Wells, John T. Wells and George Butterworth, doing business under the name of the W. L. Wells Company, but rather to *prevent these individuals from escaping their just liability*, for the action of W. L. Wells, by assuming a character that, under the law, they had no right to assume. We so insisted at the trial on the circuit.

Of course, if this court should hold with the court below that the facts detailed by John T. Wells, constituted the payment for the capital stock, subscribed for by the three indi-

viduals, then the defendants' contention upon the first issue is not sustained, and we come to consider the case as involving the *contract made between the plaintiff*, as a corporation, and the two defendants.

It will be noted that these actions are founded upon *special contracts.*

The plaintiff does not seek to recover the value of cotton belonging to it, which came into the possession of defendants, and was used by them, but *distinctly avers in the complaints a contract, or contracts*, by which the defendants *undertook* and *promised*, to pay to the plaintiffs a certain sum of money for certain property.

We submit that when an action is brought by a corporation upon a contract, made by one of its officers or agents, the *bringing of the suit upon the contract* is a ratification thereof by the corporation and, in such suit, the contract being averred and in a qualified sense, *admitted, the terms of the contract proved* must govern the settlement to be made between the parties by the court.

If, therefore, we can show the court that the defendants have complied with the terms of the contract, under which they received and appropriated to their own use the cotton set out in the exhibits attached to the complaints, then the defendants are exonerated from liability and the plaintiff cannot *adopt by suit or otherwise the contract and escape its terms.*

We come, therefore, to consider, what the contract was between the parties by whom it was made, his authority to make it, and the ratification, if any, of his act by the plaintiff corporation.

The evidence, all of which is printed, discloses the following facts:

W. L. Wells, a citizen of the State of Mississippi, and reputed to be worth from $200,000 to $300,000, carried on, prior to July, 1898, the business of selling cotton to mills in North Carolina under the name of W. L. Wells & Co., and

sold large quantities of cotton, to John F. Love, who was the treasurer and general purchasing agent of the two defendants, The Gastonia Cotton Manufacturing Company, and The Avon Mills, and was also largely interested in the Ozark mills (Record, page 29).

The large business transacted between Love, as treasurer, and Mr. Wells was entirely satisfactory to both parties, and the business for the season ending September 1, 1898, was settled up in full.

In July, 1898, Mr. W. L. Wells and his brother, John T. Wells, and George Butterworth applied to the State of Mississippi for a charter incorporating them under the name of the W. L Wells Company.

John T. Wells and George Butterworth *were men of no means whatever* (Record, page 29).

The contracts for cotton for the season of 1898 and 1899, ending September 1, 1899, were made between John F. Love, representing the defendants, and W. L. Wells, representing the W. L. Wells Company, plaintiff, and that business was finally and fully settled, so that on September 1, 1899, *nothing was due from the defendants to the W. L. Wells Company.*

Prior to this time, John F. Love and George Gray, the latter being the president of the defendant corporations, and associated with Love in the management of these mills, proposed to build near the town of Gastonia a large mill, to be known as the Loray mills, and having this object in view, applied to sundry parties, among them W. L. Wells, to join them in what may be styled the Loray enterprise. Love held out to Wells as an inducement for his joining in the Loray business that, by so doing, *his company could secure the purchasing agency*, not only for the Gastonia Cotton Manufacturing Company and the Avon Mills, *but also for the large mill proposed*; and Love consulted Wells about the location of the Loray mills and urged him to join himself and Gray, in this enterprise (Record, pages 66, 67, 68 and 69).

Wells took part in the consultations about the Loray business and assured Love that he would not only join the enterprise himself, but would also induce, as he thought he could do, some of his friends to join it also in Mississippi.

The amount of interest or stock to be taken in this enterprise by Wells and his associates, was not agreed upon, *but it was distinctly understood*, between John F. Love and Wells that *whatever interest or stock* Wells agreed to take, *should be paid by Love, treasurer, out of the amount, due from the defendants for cotton purchased from W. L. Wells.*

Having this understanding with Wells and consulting him frequently as to the Loray business, John F. Love and his associates had prosecuted the work on the Loray mills, and expended large sums of money in that business.

In May, 1900, Wells, representing, as he always did, his company in North Carolina, came to Gastonia in said State, and at that time examined the location for the Loray plant, and advised with Love about that business (Record, page 30).

During that visit Love and Wells talked of taking the stock in the Loray mills and Wells agreed that he would take $10,000 at any rate and that in certain events he would take $50,000 and expressed the opinion "that a friend of his would take an equal amount." (See pages 66 and 67 of the Record.)

When Wells left Gastonia, after his visit in May, 1900, he was still undecided as to the amount of stock he would take in the Loray enterprise, and said he would go back home and let Love and Gray know what he would do (Record, page 67).

He returned to Mississippi, where the office of the W. L. Wells Company was and *upon their letterhead, wrote the letter of July* 13, 1900, which appears in the record, on page 58, in which occurs the following :

"So, to sum the matter up, you can only depend on me for the original $10,000.00, with a bare possibility of later on increasing it to $25,000.00; but don't depend on the latter.

Hope you are progressing all right. * * * If you can possibly do so, please remit us balance on account, as we need it to settle up matters, which I should like to do before leaving next Wednesday."

This letter, by due course of mail, reached Love at his office in Gastonia a few days after it was written, and shortly after its receipt, Love, taking the invoices of the two mills, as shown on the statements rendered, ascertained that there was due for cotton, from himself as treasurer, $19,206.30, and thereupon he took the invoice marked "Exhibit B," and appearing on page 59 of the Record, and enclosed with it to the Wells Company a check for $9,206.30, having deducted the $10,000.00 mentioned in Wells' letter of July 13th.

Love wrote on the invoice with which this check was sent these words: "Account, $5,923.12."

That invoice, with the check inclosed, was received by the W. L. Wells Company and was marked "Paid Aug. 3, 1900," and returned to John F. Love, treasurer, immediately.

At that time, John F. Love, treasurer, transferred to the credit of the Loray mills, in the Gastonia Banking Company, $10,000.00 on account of W. L. Wells' subscription for stock in that enterprise, the said Loray mills (Record, page 68).

A statement of the account between John F. Love, treasurer, and the Wells Company was sent from Vicksburg on August 1st. It appears on page 53 of the Record.

When that statement was mailed from Vicksburg, the invoice and check for $9,206.30 sent by Love on July 31st, *had not reached the Wells Company in Vicksburg.*

On September 1st, the Wells Company sent to John F. Love, treasurer, the statement which appears on page 54 of the Record, showing a balance due of $12,691.67. That statement gives credit for the $9,206.30 sent by Love on July 31st, but did not give John F. Love, treasurer, credit for

the $10,000.00 which he had paid out under authority of the letter of July 13th, and the contract.

This statement was inclosed in the following letter:

"VICKSBURG, MISS., *August* 31, 1900.

"Mr. JOHN F. LOVE,
"*Treasurer, Gastonia, N. C.*

"DEAR SIR: Inclosed, we beg to hand you a statement of your account to September 1st, showing balance due us $12,691.67.

"May we ask, that you remit us, by return mail, in full, for this balance and oblige.

"Yours very truly,
"W. L. WELLS COMPANY."

Record, page 59.

Upon this letter, Love made the following endorsement, as appears on page 60, of the Record.

Stock Loray mills	$10,000.00
Interest	2,691.67
Balance	$12,691.67

We want to see your Mr. W. L. Wells about it when he comes to see us.

Yours, JOHN F. LOVE, *Treas.*

And Love returned this letter immediately with this endorsement to the Wells Company at Vicksburg, and it was received there by John T. Wells, the secretary and treasurer, and put among the papers of the company, thus notifying the office in Vicksburg, as we insist, that all the principal money had been paid according to the terms of the contract, and that the claim for interest would be adjusted between him and W. L. Wells.

The following statement of all the invoices for cotton sent by the Wells Company to John F. Love, treasurer, is *taken from the exhibits attached to the two complaints*, and it shows that the total quantity of cotton received by the two defend-

ants from the Wells Company up to July 31, 1900, was $147,362.24, and that the cash payments made to that date, including the check for $9,206.30, sent as above stated, *paid every dollar of this indebtedness* except the $10,000.00 which was then paid by the defendants through John F. Love, treasurer, to the treasury of the Loray mills.

CONSOLIDATED STATEMENT.

Avon and Gastonia Mills with Wells Co.

1899.					
Oct. 17.	To 100 B. C.	(Avon mills)	$4,644 72		
19.	" 100 "	(Gastonia mills)	3,884 32		
20.	" 50 "	" "	2,005 04		
20.	" 123 "	" "	5,328 40		
21.	" 100 "	" "	4,011 04		
23.	" 100 "	" "	3,971 60		
27.	" 175 "	(Avon mills)	8,862 79		
28.	" 100 "	(Gastonia mills)	4,082 08		
28.	" 100 "	" "	4,004 16		
31.	" 100 "	(Avon mills)	4,414 01		
Nov. 1.	" 96 "	(Gastonia mills)	3,708 41		
2.	" 50 "	" "	2,121 20		
17.	By cash remittances				22,720 23
21.	To 17 B. C.	(Avon mills)	802 22		
22.	" 86 "	(Gastonia mills)	3,405 44		
24.	" 50 "	" "	1,781 80		
28.	" 203 "	(Avon mills)	9,748 76		
Dec. 2.	" 86 "	(Gastonia mills)	3,313 61		
5.	" 92 "	" "	3,370 37		
6.	By cash remittance				15,203 91
11.	To 100 B. C.	(Avon mills)	5,089 91		
11.	" 229 "	" "	15,618 53		
11.	" 100 "	" "	4,957 29		
13.	" 100 "	(Gastonia mills)	3,892 76		
15.	" 100 "	(Avon mills)	4,574 53		
16.	" 101 "	" "	5,139 69		
21.	" 241 "	" "	10,874 72		
21.	" 30 "	" "	1,639 64		
21.	" 34 "	" "	1,476 32		
22.	" 107 "	(Gastonia mills)	4,023 94		
29.	" 35 "	(Avon mills)	2,445 86		

1900.			
Jan. 3.	To error lbs. in B. C. (Avon mills)...	12 76	
11.	" 25 B. C. (Avon mills).....	1,040 00	
11.	" 77 " " "	3,428 81	
11.	" 50 " (Gastonia mills).....	1,961 93	
13.	By cash remittance.....	....	17,835 00
24.	To 23 B. C. (Avon mills).	931 21	
27.	" 25 " " "	1,172 42	
22.	By cash remittance.....	.....	8,798 32
27.	To 55 B. C. (Gastonia mills)..	2,338 77	
June 22.	" 64 " " ."	3,283 18	
Mar. 3.	By cash remittance.....	.....	20,575 82
12.	" " "	.....	7,308 44
Apr. 9.	" " "	.....	9,714 22
June 5.	" " "	.....	16,000 00
22.	" " "	.....	10,000 00
Aug. 3.	" " "	.....	9,206 30
July 31.	" Am't paid Loray.....	....	10,000 00
		$147,362 24	$147,362 24

An examination of the evidence will show that, from the date of the receipt of the letter which Love returned to the Wells Company in the first part of August, 1900, notifying the company, as we insist, that $10,000.00 had been applied under the direction of Mr. Wells to the payment of a subscription to the Loray stock, *no demand, whatever, was made upon John F. Love, treasurer, or upon either of the defendants for the payment of this balance of* $10,000.00 *until August* 1, 1901, *when the controversy between the parties, which is involved in these suits,* was going on, and was about to culminate in this litigation.

The witness, John T. Wells, was asked to show any letter or statement calling for this balance due, as they now allege, on account of the season ending September 1, 1900, *and he was unable to show any such notice or demand* (Record, pages 31 and 32).

The defendants, therefore, contend, not only that, according to the evidence, their treasurer was justified in taking $10,000.00 of their money, and paying it into the treasury

of the Loray business in part payment of what the defendant companies owed for cotton, purchased by them from W. L. Wells, but also, that The Wells Company, plaintiff, by its *silence and the conduct of its officers*, ratified, confirmed, and acquiesced in what had been done under the contract between their treasurer, John F. Love, and the president, and general manager of the Wells Company, the said plaintiff.

In this connection, we call attention to the relation existing between W. L. Wells and the company, or association known as the W. L. Wells Company.

He was the president and general manager and had charge of all the business in North Carolina, and transacted the same (*supra*). *He was present in court when these* cases were tried. He was sworn as a witness, but was not *put upon the stand. He did not deny any statement made by Love, the treasurer of the companies, as to the agreement between himself and Love, although he had the opportunity to do so. He did not deny that he had authority from his company to transact this business in this way. He did not deny that he had reported this transaction to his associates. He did not deny that he was aware that* $10,000.00 *of the money due for the cotton of the season ending September* 1, 1900, *had been appropriated in the manner detailed above.*

We respectfully submit that the court erred when he declared the transaction above detailed constituted no evidence; that the W. L. Wells Company was bound by the contract between Love, treasurer, and W. L. Wells, its president, as detailed above.

His honor concedes the fact was established, that Wells, the president, and Love, the treasurer, had made the agreement as Love states it, and that Love, as treasurer of the two defendants, had paid this $10,000.00 into the Loray treasury, but he says, in effect, that Love in this matter acted without authority, and his companies, defendants,

must lose the money that he paid out under these circumstances.

We insist the proof is clear and positive, that the transaction was proper; that Love, treasurer, had authority from the plaintiff's proper officers to make this appropriation of this fund; and, at any rate, the evidence was such as to require that the court should submit the question to the jury, and especially that he should have submitted the question whether or not the Wells Company ratified the appropriation of this sum to the Loray business.

The subsequent conduct of John T. Wells, as will appear hereafter in this brief, the secretary and treasurer of the Wells Company, goes also to show his company's ratification of this appropriation of this sum.

The defendants say they have thus established the allegation of the answer or offered evidence, reasonably sufficient to establish it, that on August 3, 1900, *they made a full and final settlement with the plaintiff.*

The evidence discloses the fact that all the invoices charged against the defendants up to July 31, 1900, were produced on the trial, and each one of them was marked "Paid W. L. Wells Company," except those covered by the $10,000.00 paid to the Loray mills.

John Love might, therefore, reasonably ask, we think, as he did, that the claim for interest on these invoices might be left open for adjustment between himself and the president and general manager.

We come now to consider the allegation made in the answer of the defendant, to the effect that another settlement was made between the plaintiff and these defendants on December 3, 1900, or about that date.

It will be remembered that the cotton season of 1900 and 1901 began on September 1st.

The testimony of JOHN T. WELLS in regard to this settlement, is found on pages 24 and 25 of the testimony, and is as follows:

Q. "Look at Exhibit J and see if the invoices we have mentioned amount to $40,357.59?"

A. "Yes, sir; that is right."

Q. "Look at Exhibit J and see what figures and words on that exhibit are in the handwriting of J. F. Love?"

A. "Total $40,357.59, less check $25,000.00, inclosing $15,357.59."

Q. "When John F. Love, treasurer, returned you that invoice with those words and figures written on it by himself, what did he send you with it?"

A. "A New York exchange for $15,357.59."

Q. "Is the check I hand you the check inclosed?"

A. "Yes, sir."

Q. "Is the check I now hand you the check for $25,000 spoken of in Mr. Love's statement on that invoice?"

A. "Yes, sir."

Q. "Did that check, inclosed with that voucher pay all the invoices that were then due and some that were not due?"

A. "It paid all the invoices of the Gastonia Manufacturing Company up to and including November 5, 1900, and all of the Avon mill up to and including November 2d."

Q. "That is, if I understand you, it covered all the invoices that were due thirty days after the dates you have given."

A. "Yes, sir."

Q. "And the check inclosed with that invoice was received by you December 3, 1900, in Vicksburg?"

A. "Yes, sir."

The Exhibits J, Q, and R, mentioned in this testimony, will be found on page 61 of the Record.

We respectfully submit that this testimony of the secretary and treasurer of the plaintiff company, the only witness put by it upon the stand, shows clearly two things:

1. That there was a complete settlement on December 3, 1900, of all the business transacted between the plaintiff

and John F. Love, treasurer, in the season of 1900 and 1901, and that the defendant companies paid, on December 3d, in full, every invoice that was then due. Indeed, a careful examination of the dates of the several invoices will show that John F. Love, treasurer, anticipated, by a few days, some of the payments.

This evidence shows further that John T. Wells, secretary and treasurer of the plaintiff company, then knew that the $10,000.00 which he now alleges was due from the defendants on the business of 1899 and 1900, had been settled by the payment made to the Loray mills, as heretofore stated.

The following statement, the items of which, are all taken from the exhibits attached to the *complaints*, shows how the settlement of December 3d was made, and what application the plaintiff made of the $25,000.00 check sent to W. L. Wells on November 21st.

AVON AND GASTONIA MILLS—WITH WELLS CO.

Consolidated Statement from Aug. 3 to Dec. 3, 1900.

1900.			
Oct. 2.	To 50 B. C. (Gastonia mills)	$2,814 13	
" 11.	By cash		$2,814 13
" 11.	To 50 B. C. (Gastonia mills)	2,764 19	
" 20.	To 50 B. C. (Gastonia mills)	2,660 67	
" 23.	To 50 B. C. (Avon mills)	3,283 48	
" 25.	To 100 B. C. (Gastonia mills)	5,263 89	
" 29.	By cash remit'ce $2,764.19, $2,660.67		5,424 86
" 29.	To 50 B. C. (Gastonia mills)	2,648 80	
" 31.	To 150 B. C. (Avon mills)	11,428 89	
" 31.	To 50 " " "	3,281 00	
Nov. 2.	To 50 " " "	2,764 52	
" 5.	To 100 " " "	6,492 42	
" 5.	To 100 B. C. (Gastonia mills)	5,193 92	
" 21.	By cash remittance		25,000 00
	By check to balance		15,357 59
		$48,596 58	$48,596 58

We come next to inquire under what contract or agreement between John F. Love, treasurer, and W. L. Wells, the purchases of cotton for the season of 1900 and 1901, were made.

On page 68, Mr. Love, whose testimony is not contradicted, testified as follows:

Q. "Go on in your way and state what conversation occurred between you and Mr. Wells in regard to buying cotton for the season of 1900 and 1901, and what conversation you had with him in regard to his taking interest in the Loray mills?"

A. "Mr. Wells made us a visit and was with us a couple of days and, during his visit we spoke of cotton, as usual, and also spoke of the Loray mills. We told him that we would like for him to continue buying our cotton, as before, and if he carried out the agreement about the Loray stock, we wanted him to continue buying our cotton, but that we had an offer from another party, who would become interested with us, but that we would give him the preference before making the other trade."

Q. "What did he reply to that?"

A. "He said, after talking with him, that he would take the stock, the balance we first talked, about the $50,000.00, and that he would go home and let me know in a few days. In the meantime we had to have some cotton, and he went on home and commenced shipping us cotton."

Q. "What was the condition of the Loray mill at that time?"

A. "The buildings were going up, and I think we had two hundred tenement houses erected."

Q. "Did he see that property?"

A. "Yes, sir."

Q. "Talk to you about it?"

A. "Yes, sir."

Q. "Did you or did you not, advise him about the business?"

A. "We did."

On page 70 of the Record, Mr. LOVE was asked the following questions:

Q. "Anything said in his visit here about the cotton payments?"

A. "Yes, sir; he wanted to know how we wanted to pay for the cotton."

Q. "What was agreed?"

A. "I told him we would pay for it along as usual, make our regular monthly payment, and whatever stock he took, was to be taken out of this."

It will be remembered that the agreement as to paying for the cotton by paying for the Loray stock was agreed to between Wells and Love prior to July 13, 1900, as heretofore stated in this brief.

Mr. Wells, it seems, returned to Vicksburg, where the principal office of the plaintiff was, and where John T. Wells resided, and on October 4th he wrote to John F. Love the letter of that date, which is so important in its bearing upon this controversy that we here copy it in full:

"VICKSBURG, MISS., *October* 4, 1900.

"Mr. JOHN F. LOVE, *Gastonia.*

"DEAR MR. LOVE: In reference to the Loray matter, I have arranged to take the $50,000.00 stock, but want you, as stated when there, to let this come in on the last payments say about 1st January next. This will enable me to clean up my deal I wrote you about last spring, and besides, for the next 90 days I will be crowded somewhat for money to carry on my business. I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them, hence in writing me about this, please mark your letters (76) 'Personal.'

"Please keep me posted about how the Loray is progressing. With regards to Mr. Gray, I am,

"Yours truly, W. L. WELLS."

It will be noted that in this letter, Wells, referring to the interview between himself and Love, when the contract for

the purchase of this cotton was made, states *that he will take the whole sum of* $50,000.00 *in stock, and especially requests that it shall be paid for out of the January payments for cotton.*

The proposition contained in this letter as to the time when the stock should be paid for was agreed to by Love on behalf of the defendants, and in consequence of that agreement, the settlement of December 3d heretofore set out, was made by him.

We respectfully ask the court to note that when the check for $25,000.00 was sent to the plaintiff company, on November 19th (Exhibit R, page 61), no direction was given as to the application of this fund.

On page 69, it appears that Love was asked:

Q. "Did you send him a check for $25,000.00?"
A. "Yes, sir."
Q. "Why did you send that check?"
A. "He had been shipping us some cotton and wanted us to make a payment on it."
Q. "Did you direct how that should be applied?"
A. "No, sir."

And, on page 70:

Q. "What application was made with that $25,000.00?"
A. "In payment of the bills inclosed."
Q. "The bills were dated what date?"
A. "The bills were dated in October and November, 1900."
Q. "Was any part of it applied on the bills of the season of 1899 and 1900?"
A. "No, sir."
Q. "Did they send you any notice that the balance was due?"
A. "No, sir."

We submit that these facts have a bearing upon the payment of the $10,000.00 in July, and certainly were sufficient in their effect to make it necessary and proper that the jury should be allowed to pass upon the question whether the

plaintiff company had not, by its conduct, ratified the appropriation of $10,000.00 to the Loray matter.

Having thus, we think, shown from the evidence the allegation of the answer, to wit, that the defendant companies made a full settlement with the plaintiff through its proper officers, on August 3, 1900, and again on December 3, 1900, it remains to inquire what transactions took place after the latter date.

On page 70, it appears that this question was asked the witness, Love:

Q. "How much was due from your two companies to the Wells Company, in December, 1900, after this $15,357.59 payment was made?"
A. "$40,681.08."
Q. "Have you the invoices constituting this gross sum?"
A. "Yes, sir."
Q. "What did you do with the $40,000.00?"
A. "I placed it to Mr. Wells' credit for Loray stock."
Q. "Was that sum paid to the Loray Mills treasury by you?"
A. "Yes, sir; in cash."
Q. "What became of it?"
A. "It was expended in the work of the mill."
Q. "Have you the books, showing that payment?"
A. "Yes, sir."

The fact that Love, treasurer, paid into the Loray treasury this $40,000.00, just as he had theretofore paid into this treasury the $10,000.00, is fully established by the evidence in the case, and seems to be conceded in the opinion which the court filed.

We take it, therefore, that the controversy is not as to the *fact of these payments* into the Loray treasury, but as to the *authority of the defendant companies to make these payments, and to demand credit therefor.*

The following statement, taken from the exhibits attached to the complaint, except the item of $40,000.00, and the item of $688.08, shows how the account between the plaintiff and

the two defendants stood after the $40,000.00 was paid to the Loray treasury, and, below on this statement, is a full account of what the defendants admit to be due the plaintiff, including the balance of $688.08:

AVON AND GASTONIA MILLS WITH WELLS CO.

Condensed Statement from December 3, 1900, to January 3, 1901.

1900.					
Nov.	15.	To 50 B. C. (Gastonia mills)	$2,637 84		
"	21.	To 100 " " "	5,190 82		
"	24.	To 100 " " "	5,276 24		
"	24.	To 118 B. C. (Avon mills)	6,515 36		
"	26.	To 100 B. C. (Gastonia mills)	4,862 35		
"	26.	To 100 B. C. " "	4,954 48		
"	28.	To 100 B. C. (Avon mills)	5,598 14		
"	28.	To 100 " " "	5,675 35		
"	20.	By overcharge ft. (Gastonia mills)			22 50
Dec.	31.	By amount paid Loray mills			40,000 00
		Balance			688 08
			$40,710 58		$40,710 58
Dec.	31.	To balance	$688 08		
"	4.	To 24 B. C. (Gastonia mills)	1,229 13		
"	18.	To 100 B. C. " "	5,381 28		
"	20.	To 83 B. C. (Avon mills)	4,862 89		
		By overcharge ft. (Gastonia mills)			13 03
		Balance			12,148 35
			$12,161 38		$12,161 38
		Gastonia mills owe	7,285 46		
		Avon	4,862 89		
			$12,148 35		

The attention of the court is called to the letter written by Love to W. L. Wells on February 2, 1901, and also to the letter of February 5, 1901, pages 62 and 138 of the Record, and to the fact that the *defendant corporations were not called upon* to pay either the $10,000.00 of the season of 1899 and 1900 nor the $40,000.00 paid to the Loray treasury

in the season of 1900 and 1901 *until the Loray enterprise had gotten into trouble and the interest taken therein was worth less than par.* Then, *for the first time these defendants are informed* that W. L. Wells, the president and manager of the plaintiff corporation, had no power to make the contract he made, and the position is taken that the defendants must suffer the loss, if any, sustained by this investment in the Loray enterprise rather than W. L. Wells or his corporation, the plaintiff in this action.

As to the authority of W. L. Wells, not only as president but as general manager, we refer the court to pages 27, 28, 29 and 30 of the printed record.

On page 30, John T. Wells, testifying as to the relation of W. L. Wells to the plaintiff company, made the following statements:

Q. "Was he allowed interest on the capital which he furnished the company?"
A. "No, sir; he didn't furnish any capital; he loaned them some money."
Q. "Did he furnish any credit?"
A. "Yes, sir; he furnished most of it."
Q. "Won't you say he did all of it?"
A. "No, sir."
Q. "Who did, if you and Mr. Butterworth were insolvent?"
A. "We had a reputation of being honest."
Q. "I will ask you if Mr. W. L. Wells was not the head of the concern, and all of the W. L. Wells Company?"
A. "No, sir; he was not."
Q. "In what particular was he not?"
A. "He didn't have the entire management of it, and he didn't furnish everything."
Q. "What didn't he have control of?"
A. "He didn't have entire control of anything."
Q. "What did he not have control of?"
A. "The making of contracts, the selling of cotton and everything else."
Q. "Didn't he generally make the contracts?"
A. "He did sometimes."
Q. "Did you travel at all for the company?"
A. "No, sir."

Q. "Did Butterworth ever travel for the company?"
A. "He did, in the country, to buy cotton."
Q. "Who transacted all the business of the W. L. Wells Company in North Carolina?"
A. "W. L. Wells."
Q. "You had nothing to do with it?"
A. "No, sir."
Q. "Nor Butterworth?"
A. "No, sir."
Q. "Your business was simply to receive the money and pay it out as Mr. W. L. Wells directed it?"
A. "No, sir."
Q. "Under whose direction did you pay it out?"
A. "Under the direction of a consultation between us. We advised as to the policy of the business."
Q. "Did you advise about the policy of the business in North Carolina?"
A. "Yes, sir."
Q. "When?"
A. "From time to time."
Q. "In the meeting of the directors?"
A. "Yes, sir. We might call a meeting of the directors, W. L. Wells and I. We were the directors and officers and conducted the business."
Q. "You kept up with the business of the company?"
A. "Yes, sir."
Q. "Did you ever refuse to ratify any act that W. L. Wells did for the company?"
A. "No, sir."
Q. "Did you ever object to any act that W. L. Wells did for the company?"
A. "Yes, sir."
Q. "Can you recall one act?"
A. "No, sir."

The undisputed evidence discloses the fact that the contract between W. L. Wells and John F. Love for the sale of the cotton, the price of which is sought to be recovered in this action, was very profitable to the plaintiff (Love's evidence, p. 71, and Craig's evidence, p. 109), and that one of the material inducements to Love for making this contract

was the agreement by Wells to subscribe for $50,000.00 of the stock of the Loray mills, which was to be paid for from the proceeds of the sale of said cotton (Love's evidence, pp. 63, 69, 70, 96, and Exhibit S).

With notice that the defendants below relied upon the terms of this contract as authority for paying the $50,000.00 to the Loray mills on said stock subscription, and without any offer to return the profits made by the sale of said cotton, the plaintiff below brought these actions (W. L. Wells having sworn to the complaints, p. 4), and prosecuted them to final judgment in the circuit court, and still insists that it is entitled to recover the price of said cotton, delivered pursuant to this special contract, thereby attempting to repudiate only so much thereof as required Wells to subscribe for the Loray stock and authorized Love to apply part of the purchase price of the cotton in payment therefor.

Specification of Errors Relied upon.

The first, second, third, fourth, and fifth exceptions are as follows:

First Exception.

The defendant thereupon moved to dismiss the action, because the court, as appears from the testimony, has no jurisdiction thereof, there being no evidence introduced to show that the plaintiff, W. L. Wells Company, was, at the time this action was brought, or is now, a corporation duly created and organized or invested with the right to bring this action under the laws of the State of Mississippi, and that the plaintiff has no legal capacity or right to sue in this court, and upon the further ground that the plaintiff's testimony shows that the plaintiff has no legal capacity to sue in this court, and that this court has no jurisdiction of the action.

Second Exception.

The testimony in the case here closed, and the defendant thereupon renewed its motion to dismiss the complaint, or for judgment, as in case of nonsuit, under the acts of assembly of the State of North Carolina above recited.

Third Exception.

The defendant then moved to dismiss the action, for want of jurisdiction in the court, upon the grounds which were assigned at the close of the plaintiff's testimony, the plaintiff not being a citizen of a State different from that of the defendant.

Fourth Exception.

The court charged the jury that, upon the evidence in the case, the first issue should be answered "yes," and directed the jury so to answer that issue.

Fifth Exception.

The court charged the jury that, upon the evidence, the second issue should be answered "yes," and directed the jury so to answer that issue.

These five exceptions involve two points: First, that the evidence did not show the plaintiff to be a corporation, duly created and organized under the laws of the State of *Mississippi*; and, second, that the evidence did not show the plaintiff had the capacity to make and enforce the contract set out in the complaints; but, on the contrary, discloses the fact that it had no such capacity.

The sixth exception is as follows:

Sixth Exception.

The court charged the jury that, upon the evidence, the third issue should be answered "yes," and that plaintiff was entitled to recover the full amount demanded in the complaint, with interest, and directed the jury to answer the issue accordingly.

This exception involves the question whether plaintiff is bound by the stipulation in the contract as to the subscription for the stock of the Loray mills, either originally or by ratification and acquiescence.

The substance of this exception is that the court erred in his instruction to the jury, that there was no evidence, reasonably sufficient to establish the fact of payment by the defendant of fifty thousand dollars, or any other sum, for the Loray stock as alleged in the answer, for and in behalf of the plaintiff, W. L. Wells Company.

All the questions thus presented by the exceptions will be considered in the following order:

Syllabus of Argument.

I.

The question of jurisdiction.

A. The plaintiff was not a *de jure* corporation, as it had not been organized under the Mississippi statute. No stock had been paid for, even if John T. Wells' testimony is taken as true. The pretended payment was not even colorable.

B. It is not sufficient to give this court jurisdiction, that plaintiff below is a *de facto* corporation, or to be considered as a corporation, by reason of an estoppel.

C. The question of jurisdiction is properly presented by the pleadings.

D. If the question of jurisdiction is not presented by the pleadings, the court should have taken notice of the question under the judiciary acts of 1875 and 1887, if the want of jurisdiction as to the person or subject-matter appeared, at any time or in any manner, in the course of the trial.

II.

The plaintiff had no power to contract or to sue upon alleged contracts.

III.

The plaintiff below is bound by the contract made by W. L. Wells, and the defendant is entitled to a credit on the purchase-money, by reason of the subscription to the stock.

A. The taking of the stock in part payment of the price of the cotton was not *ultra vires*.

(1.) The taking of the stock, by the defendant, in part payment of the price, was a mere incident of the transaction in regard to the sale of the cotton, and, therefore, was *infra vires*.

(2.) If the taking of the stock in part payment of the price of the cotton was not a mere incident of the sale by plaintiff to defendant, and, therefore, *infra vires* originally, the contract, as between Wells Company and the defendant was fully executed, and the doctrine of *ultra vires* did not apply. The cotton had been sold and delivered and the money actually paid by defendant to the Loray mills for the stock.

B. W. L. Wells had original authority to make the contract, including the stipulation as to the stock of the Loray mills.

C. The contract was ratified by the subsequent dealings and correspondence between the parties, as shown by the oral evidence and exhibits.

(1.) The plaintiff received a benefit from the sale of the cotton, in the way of large profits, which they retain, and having thus ratified that part of the contract which favored them, they thereby ratified the whole.

(2.) The plaintiff had notice of the terms of the contract between defendant and its agent, W. L. Wells, and did not repudiate the same, but acquiesced therein by its silence.

D. The plaintiff below ratified the contract by bringing this action for the purchase price, as fixed by the contract, and also by continuing to maintain and prosecute this suit, with knowledge of the terms of the contract in regard to the stock.

IV.

The judge had no power or right to withdraw the consideration of the case from the jury and peremptorily to direct a verdict, in view of the evidence submitted in the case, even under the practice prevailing in the Federal courts. The evidence more than reasonably tended to establish the plea of payment or the defense as to the credit for the stock subscription, and should have been submitted to the jury.

The Question of Jurisdiction.

A. The plaintiff was not a de jure corporation, as it had not been organized under the Mississippi statute. No stock had been paid for, even if John T. Wells' testimony is taken as true. The pretended payment was not even colorable.

The articles of incorporation (page 40 of Record) provide as follows:

"The capital stock of said corporation shall be $50,000.00, divided into shares of $500.00 each, and, as soon as $10,000.00 of said stock is subscribed and paid for, said corporation shall have power to commence business."

It is admitted that no payment was made on the stock subscription by W. L. Wells, John T. Wells or George Butterworth, except as testified by John T. Wells.

There was no payment on the subscription during the first year after the articles of incorporation were filed and the certificate was issued. It is contended, however, that, during that year, there was a large profit made in the business, and, at the end of the year, this profit or the accumulated earnings far exceeded the amount of the payment required to be made by the articles of incorporation. No meeting of the corporation was ever held to declare a dividend, and no resolution ever passed, directing that the profits or any part of them should be paid to the several stockholders as dividends or otherwise. This profit remained on the books of the company to its credit, with the exception of the amounts drawn by the several persons composing the company, whether a corporation or partnership, for their own private use and benefit. Not a dollar was applied to the payment of the stock subscriptions by any resolution or other formal action of the company, or of any persons representing it, nor is there any entry on the books of the company, showing

any such application of its funds. In view of these facts, how can it be contended that there has been any payment? Surely the dictum of the witness, John T. Wells, did not prove it or tend to prove it, when he admits that no formal action was taken by the company. If he had testified that the necessary amount had been paid on the subscriptions and then stopped, there may have been some evidence to show payment, but he tells us what he meant by payment, and what he tells us is not sufficient in law to constitute payment.

"A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made. He has no inchoate or other right until the dividends have been declared."

Queen vs. Arnaud, 9 Ad. & El. (N. S.), 806.
Brown vs. Collins, L. R., 12 Eq. Cases, 594.
Van Allen vs. Assessors, 3 Wall., 573.
Hyatt vs. Allen, 56 N. Y., 557.
Minot vs. Paine, 99 Mass., 101; 96 Am. Dec., 705.
City of Utica vs. Churchill, 33 N. Y., 237.

Profits, until a division is made, are assets of the corporation, and not income due the stockholders.

Waterman vs. Alden, 42 Ill. App., 294.

It is not pretended that any of the members of the company paid anything on the stock subscriptions out of their own pockets. The only contention that can be made is that, by reason of accumulation of profits of the business during the first year, there were sufficient assets to pay the required amount on the subscriptions for stock. But this fund belonged to the company and could not be applied to the payment of stock subscriptions without its consent and without some formal action taken by it. Unless this was done, "the incorporation of the company could not be effected."

R. R. vs. Mason, 16 N. Y., 451–456.
Jersey City Gas Co. vs. Dwight, 29 N. J. Eq., 242.

If there was no payment for the subscriptions for stock, there was necessarily no proper organization of the corporation, under the laws of the State of *Mississippi*, and, therefore, the circuit court had no jurisdiction, even though the defendant was estopped to deny the general corporate existence of the plaintiff.

Morawetz on Private Corporations, section 267, first edition. "Subscription, made without deposit, is void." This author, cites many cases, in support of this, amongst them, Fiser *vs.* Miss. Central Railroad Co., 32 Miss. Rep., and Barrington *vs.* Miss. Central, 32 Miss. Rep. On pages 40, and 41, of the Record, are to be found the charters of incorporation, of the W. L. Wells Company. Section 2, of these charters, is as follows:

"The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars, each, *and as soon as ten thousand dollars of said stock, is subscribed, and paid for* said corporation shall *have power* to commence business."

There is no denial of the fact, that *this sum was not paid as provided in the charters.*

"A corporation may begin business, *as soon as the amount fixed by its articles of incorporation, has been paid.*" The American Corporation Legal Manual, 1902, page 301.

This is the statute law of Mississippi. This provision in the charter, the payment of the subscription, is mandatory.

"In forming a corporation under a general enabling act, it is necessary *that all* of the *mandatory provisions of the statute, should be substantially complied with.*"

Beach, on Private Corporations, page 18, section 12, vol. 1, and cases, cited, by the author.

"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals

seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, *any material omissions, will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly* be called in question."

There is a distinction "between cases, when a corporation is created by *special charter*, and there has been user, *and where individuals seek to form themselves into a corporation, under a general law.*"

"*In the latter case, it is only in pursuance of the provisions of the enabling act, that corporate existence can be acquired.*" In this case, an incorporation, by general law,—an enabling act,—one of the provisions, was, THE ACTUAL PAYMENT OF TEN THOUSAND DOLLARS. Beach on Private Corporations vol. 1, page 26, section 16, and cases, cited by the author.

Where individuals become a corporation, under provisions of a *general statute*,—an enabling act—the law requires a strict measure of compliance, with these statutory provisions.

"It is immaterial, that the persons, attempting incorporation, have acted in good faith, and have actually carried on business, under their supposed authority to act, as a body corporate."

Beach on Private Corporations, page 27, section 16.
Biglow vs. Gregory, 73 Ill., 197.

The Biglow case, cited here, is quoted from, by Adams, chief justice, in Kaiser *vs.* Lawrence Savings Bank, 56 Iowa, 104, reported, also, in 41 American Rep., page 85.

Indeed, the quotations, from Beach, above, are copied, almost literally, from these cases.

In the case of Kaiser *vs.* Lawrence Savings Bank, above, itself, a leading case, the court cites many cases, among them, the Biglow case, saying:

"This is a late decision, and seems to have been made, with a full recognition of the authorities, claimed, to hold an adverse doctrine."

We invite the court's attention, especially, to the case of Kaiser *vs.* Lawrence Savings Bank, 41 American Rep., 85. So far, is the doctrine, we refer to, here, carried, that, it is held,

"A corporation, defectively organized, can pass no title to property held by it, as its own."

Hicks *vs.* Converse, 37 La. Ann., 484, cited by Beach in the section above referred to.

I.

B. It is not sufficient to give the court jurisdiction, that the plaintiff is a de facto corporation, or a corporation by reason, merely, of an estoppel. It must be a de jure corporation.

The Federal courts have only limited jurisdiction, authorities and powers are strictly statutory. They can acquire jurisdiction of a case only in the manner pointed out by the statute.

Farrington vs. Pillsbury, 114 U. S., 138.

The statute requires that the plaintiff shall be a citizen of a State other than that of defendant, but there must be diverse *citizenship*.

A corporation can become a citizen within the meaning of this statute only by being duly chartered and organized under the law of the State of its origin.

The right to sue in the Federal court must depend upon the legal status of the plaintiff as a citizen, and not upon any estoppel arising out of the particular nature of the transaction involved in the suit. Otherwise, a plaintiff might be permitted to sue as a corporation when it had not been legally created and organized and was not, in fact, a citizen. It cannot be a citizen in one case and not in another, in the same court. It cannot be a citizen for the purpose of suing in contract, and not a citizen for the purpose of suing in tort or in a case where no estoppel could arise by reason of

the nature of the transaction upon which the action is based.

But we have already shown that plaintiff is not even a *de facto* corporation, and also that defendant is not estopped by any dealings with plaintiff to show that there is no corporation.

I.

C. The question of jurisdiction is properly raised by the pleadings.

While it is not the law that objection to the jurisdiction in such a case as this must be taken by a plea in abatement since the passage of the judiciary acts of 1875 and 1887, as will be shown in this brief hereafter, yet, if such was the general rule, as it was under the judiciary act of 1789, it would not apply to this case, as questions of pleading and procedure are governed by the statutes of the State where the suit was brought, and, under the statutes of North Carolina and the practice and procedure of its courts, there is no such thing as a plea in abatement.

The Code of North Carolina provides that when the want of jurisdiction appears on the face of the complaint, the objections to the jurisdiction must be taken by demurrer.

Code, section 239:

Objection to the jurisdiction "is not the subject of a plea at all."

Flack vs. Dawson, 69 N. C., 42.
Bank vs. Brittain, 66 N. C., 365.

When the want of jurisdiction does not appear on the face of the complaint, the objection to the jurisdiction should be taken by answer. When, therefore, the complaint makes the necessary averments, the question of jurisdiction can be raised by an answer merely denying these averments of the com-

plaint (Code, sec. 240), because, if the averments are not true, the court is without jurisdiction. It is only necessary to state the facts, affirmatively, in the answer when there is no allegation as to jurisdiction in the complaint, and this can never be necessary in the Federal courts, as the plaintiff, is required to allege the jurisdictional facts, and a general denial of them, is equivalent to a statement in the answer that the facts do not exist, which is the substance of a plea in abatement.

Forms of pleading, are abolished in North Carolina, and the only pleadings, are complaint, demurrer, answer, and reply, and the court is required to pass upon any material question presented, without regard to the form or manner in which it is presented, and all pleadings must be liberally construed.

Code, sections 133, 260, and 276.

The Federal courts follow the statutes and decisions of the courts of the State where the action is brought, with reference to the form and order of pleadings, and the manner in which objection to the jurisdiction of the court shall be taken.

S. P. Co. vs. Denton, 146 U. S., 202, and cases cited.

The question we have here is expressly decided in Roberts *vs.* Lewis, 144 U. S., 651, and it is there held that a general denial in the answer of the allegation of citizenship in the complaint, is sufficient, under the Code practice and procedure, to raise the objection *to the jurisdiction and takes the place of a plea in abatement.*

In the case at bar, the defendant specifically "denies the allegation," in the complaint, that the plaintiff is a corporation of Mississippi.

Upon this denial, the court framed the issue, as follows:

"1. Is plaintiff a corporation," as alleged in the complaint?

This issue was joined, as upon a plea in abatement, because it went to the person of the plaintiff.

Emerson Co. vs. Nimmocks, 88 Fed. Rep., 281.

As before explained, in this brief, the answer, under the Code, denied the allegation of the fact, which gives jurisdiction to the court, known as a jurisdictional fact. It would, under the practice, before the enactment of the Code, in North Carolina, have required a plea in abatement to raise the question now raised, by a denial of this jurisdictional fact, to-wit: that "plaintiff is a corporation of Mississippi." It would have been the same, but for the judiciary acts of 1875 and 1887, in the Federal courts. The necessity of the plea in abatement has been abolished by these acts of Congress; anyhow, the Code practice in North Carolina, is that of the circuit court held in that State.

As we submit, the office of the plea was to deny the jurisdictional fact. In the traverse of the first paragraph of the complaint, that office is subserved, the object of the old plea, in abatement, accomplished under the Code practice.

This denial raised the issue as above set out. The plaintiff offered evidence upon this issue, the evidence heretofore recited in this brief. The burden of proof was upon the plaintiff on this issue. Upon, and in the light of this evidence, the foregoing argument and citations are submitted. There can be no estoppel, as before observed.

So, we submit, that this court has no jurisdiction, because there is no "corporation created and organized under the law of Mississippi."

The provision requiring payment of the ten thousand dollars, is mandatory; and we insist, that, in passing upon the question of whether there is a corporation, it is, as upon the old plea in abatement, and wholly regardless of the facts of the case, the merits, or, any dealing or contracts, between the parties. Estoppels of this kind, do not apply to pleas in

abatement; or issues, raised upon facts, which go to the jurisdiction of the court, under the Code of North Carolina.

It is to be observed, that the second issue, is substantially similar to the first. We submit, that if there had been a plea in abatement, as under the old practice, the court would have decided that issue, so raised by the plea, upon the evidence offered upon the same, by the plaintiff, and only upon that. That evidence did not include, or embrace, any of the alleged dealings, between the parties. That being so, there could be no estoppel, as claimed in the opinion of the court, filed, since the bill of exceptions was signed, as before suggested.

Under the practice in North Carolina, there is no plea in abatement, and as this point could not be raised by demurrer, it not appearing upon the face of the complaint, it could only be, by answer, which is a "general or specific denial, of each material allegation in the complaint, etc." Sec. 243, Code N. Car., page 93.

The issue is raised as required by the code, in the said section, 243. We submit, therefore, "the circuit court had no jurisdiction of this action." If there had been no denial, of this jurisdictional fact, by what is the same, as a plea in abatement, we submit, that, inasmuch as the payment of this sum of ten thousand dollars, is an "*act, declared to be a necessary step, in the process* of incorporation," under the laws of Mississippi, "its omission is fatal, to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation" can be called, properly, in question. Beach on Private Corporations, sec. 16, vol. 1, page 26.

This is so, because, it was "*only in pursuance, of the provision, of this enabling act, that plaintiff's corporate existence is acquired.*" *Ibid.*

Third Street and Suburban Railway Co. *vs.* Lewis, 173 U. S. Rep., 457; King Bridge Co. *vs.* Otoe Co., 120 U. S. Rep., 225.

In the above case of King Bridge Company, Justice Harlan, quoting from Mansfield, etc., Railway Co. *vs.* Swan, 111 U. S., 379, 382, says:

"The rule springing from the nature, and limits of the judicial power of the United States is inflexible, and without exception, which requires this court of its own motion to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases, where such jurisdiction *does not affirmatively appear* in the record, on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question, is, that of jurisdiction, first, of this court *and then of the court, from which the record comes*" (Italics, *ours*).

All United States courts are *statutory courts*, upon the records, of which, jurisdiction must affirmatively appear.

I.

Williams vs. Nottaway, 104 U. S. Rep., 209.
Farrington vs. Pillsbury, 114 U. S. Rep., 138.

D. If the question of jurisdiction is not raised expressly by the pleadings, the court should have taken notice of the question, under the judiciary acts of 1875 *and* 1887, *if the want of jurisdiction as to the person, or subject-matter, appeared at any time, or in any manner, in the course of the trial.*

It was held, under the judiciary act of 1789, that the objection to the jurisdiction must be raised by a plea in abatement, but the Supreme Court of the United States has repeatedly decided that, since the judiciary acts of 1875 and 1887, a plea is not required because, by those acts, it is made the duty of the court, to inquire, into its own jurisdiction, and if it shall appear, in any way, that the court has no juris-

diction, in the particular case, the court should dismiss the action.

Act of March 3, 1875, 18 Statutes at Large, 470.
Act of March 8, 1887, 24 Statutes at Large, 373.

In construing these statutes, the Supreme Court, of the United States says:

"While under the judiciary act of 1789, an issue as to the fact of citizenship could only be made, by plea in abatement, when the *pleading properly averred the citizenship*, of the parties, the act of 1875 imposes upon the circuit court, the duty of dismissing a suit, if it appears at any time, after it was brought and before it is finally disposed of, that it does not really and substantially, involve a controversy of which it may properly take cognizance, and the statute does not prescribe any particular mode, in which such fact may be brought, to the attention of the court. *It may be done by the affidavits; or, the depositions, taken, in the case may be used for that purpose.*"

Morris vs. Gilmer, 129 U. S., 315.
N. & L. R. R. vs. B. & L. R. R., 136 U. S., 356.
Lake Co., Com'rs, vs. Dudley, 173 U. S., 254.
K. I. B. & M. Co. vs. Otoe, 120 U. S., 225.
Farrington vs. Pillsbury, 14 U. S., 138.
Williams vs. Nottaway, 104 U. S., 209.

"Whether the court whose judgment has been brought here for review had or had not jurisdiction, is a question which this court must examine and determine, *even if the parties forbear to do it, or consent that the case be considered upon its merits.*"

Metcalf vs. Watertown, 128 U. S., 586.

II.

The plaintiff had no power to contract or to sue upon alleged contracts.

If there was no payment of the subscriptions for stock, then the plaintiff had no capacity to make any contract, and those alleged in the complaint are void, and cannot be enforced in any court.

"In Johnston *v.* Hines, 61 Md., 130, this court has said, speaking of the invalidity of a mortgagee's title derived from a trustee's deed made without ratification of the sale, but after ratification of an audit: 'There is marked and important distinction between nullities and irregularities. An irregularity may be waived; a nullity never can be waived.' In recognition of this fundamental principle, the exact question raised here was decided in the recent case of Jones *v.* Aspen Hardware Co., 21 Colo., 263; 29 L. R. A., 143. This was an action of replevin by the company to recover a stock of goods. The statute in that case provided that every corporation incorporated under any general or special law, should pay the State a fee, to be graded according to its capital stock, to be due and payable upon the filing of the certificate of incorporation, and that no such corporation should have or exercise any corporate powers until such fee should have been paid; and it was held that an association, having failed to comply with the statute with respect to the payment of the fee, was neither a *de jure* nor a *de facto* corporation, and was not competent to maintain a suit as such. The court said: 'The language of the act is plain and unambiguous. * * * The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence. * * * A *de facto* corporation can never be recognized in violation of a positive law. * * * There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisite to the exercise of such powers.' These principles were clearly recognized and applied in Boyce *v.* Tow-

sontown Station of M. E. Church Trustees, 46 Md., 373, 374, where the court said: 'The statute law of the State expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law and clearly against its policy, and justified upon no sound principle in the administration of justice."

Md. Tube & I. Wks. vs. West End Imp. Co. (Md.), 39 L. R. A., 810.

"Appellees did not act in good faith in procuring their act of incorporation, as is disclosed by their own evidence. In order that such corporate character be sustained, even if the parties had fully incorporated and organized as a corporate body, it is necessary that both the State creating the corporation and the corporation created shall have acted in good faith in conferring and taking the corporate privileges. These things, being matters of proof, must be shown by evidence, and it devolved upon appellees to show this. 'A corporation must have obtained its franchise in good faith, in order to preserve its corporate character in its contracts, and shield its members from personal liability on such contracts.' A corporation cannot incorporate in one State for the purpose of carrying on all of its corporate business in another. The stockholders would be held to be partners. Hill *v.* Beach, 12 N. J. Eq., 31; Cook, Stock and Stockholders, sec. 238; see also Land Grant R. & T. Co. *v.* Coffey County Com'rs, 6 Kan., 245; Morawetz, Priv. Corp., 1st ed., sec. 513; Erie R. Co. *v.* State, 31 N. J. L., 543, 544. That the Alston Grocery Company could, as a corporation, maintain suits, or could even have done so as such corporation, in this State while in business, would hardly be affirmed by any lawyer; but that it could have, as a firm of individuals or partners, maintained or defended such suits, could not be successfully denied. The authorities already cited amply and fully sustain these positions."

Empire Mills vs. A. G. Co., 12 L. R. A., 366.

The organization must be *bona fide*.

T. I. Dist. vs. Shepherd, 185 U. S., 13.

"These individuals, then, must be treated and dealt with by the law as partners trading under the name they have assumed. Although their object in taking the name they did was to avoid personal responsibility, the law will not allow them so to escape. A court of equity, as well as a court of law, will treat them as partners."

Hill vs. Beach, 12 N. J. Eq., 31.
Beach on Private Corporations, sec. 16, page 25, vol. 1, and cases cited in note.
Kaiser vs. L. S. Bank, 41 Am. Rep., 85.

"The plaintiff sues as the Aspen Hardware Company, and the facts alleged show that such company was a copartnership, and not a corporation. There is nothing in the name of the association to conflict with this as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. Cook, Stock & Stockholders, sec. 233; Chaffe *v.* Ludeling, 27 La. Ann., 607. This principle has been applied in many cases where parties have set up the defense of individual non-liability by reason of having directed an incorporation to be had, but where none in fact was consummated. Cook, Stock & Stockholders, secs. 233, 234; Abbott *v.* Omaha Smelting & Ref. Co., *supra;* Empire Mills *v.* Alston Grocery Co. (Tex.), 12 L. R. A., 366. The law having cast this liability upon the members of the association, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded with directions to the district court to allow the parties to amend their pleadings as they may be advised."

Jones vs. Aspen Hardware Co., 29 L. R. A., 143.

"If an attempt to organize a corporation fails by omission of some substantial step or proceeding required by statute, its members or stockholders are liable as partners for its acts and contracts."

Bergeron vs. Hobbs, 96 Wisc., 641 (65 A. St. R., 85).

The Wells Company had no legal right to transact business, because the capital stock was not paid, as required by the statute.

Burns vs. Beck (Ga.), 10 S. E. Rep., 121.

The defendant is not estopped in this case by any dealing with the corporation, to deny that it had the power to contract or to sue upon its contract.

In Doyle vs. Mizner (Mich.), 3 N. W., 968, the court says:

"There are certainly many cases in which a recognition of corporate existence, by dealing with the corporation, will estop from questioning it. But this doctrine rests on the ground that such action creates relations and encourages conduct which there may be difficulty in undoing. In ordinary cases such recognitions have been considered as binding.

"But this rule is one originating in equitable principles and cannot be applied universally. There would be no sense in applying it where no new rights have intervened, and where such recognition has itself been brought about by fraudulent dealings carried on for the very purpose of entrapping a party into the action on which such recognition is rested. If there was no corporation in fact, and if there are no facts which make it legally unjust to forbid its denial, it is difficult to understand what room there is for an estoppel; and, inasmuch as facts were asserted by plaintiff tending to show good reasons why he should not be estopped, and that testimony was open to the jury, the rulings upon the proof of corporate existence are fairly open to review."

"Each of them knew what was done, and was bound in law to know there was no incorporation."

Ibid., p. 972.

In Welland Canal Co. vs. Hathaway, 25 Am. Dec. (N. Y.), 51, the court says:

"The plaintiffs held themselves out to the world as a corporate body, duly constituted to transact business in the

manner and under the circumstances detailed in the special verdict, and the defendant has contracted with and done labor for them under the supposition that these professions were correct. If they have not the powers and privileges assumed on their part in their dealings with him, it is their own fault, not his. Whether they had these powers must have been known to themselves, not to the defendant, and no act of his could legally add or detract from them. Why, then, should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner and before a tribunal which can entertain their suit only upon the proof or assumption that they are a corporate body, duly constituted by competent authority?"

* * *

"But it is said that the defendant, by his contracts with the company, has admitted that they are a body corporate, duly constituted by law. I cannot assent to this position. The evidence proves that he has contracted with the agent of an association denominating themselves the Welland Canal Company, and nothing more. Whether they were incorporated by competent authority, or if incorporated, what were the legal capacities, are not admitted by him. To justify the inference attempted to be drawn from the contract with the plaintiffs, it must first be shown that there cannot exist an association styling themselves the Welland Canal Company, unless such association be incorporated and possess the legal capacity to contract, and to prosecute suits in courts of justice; but if such association can exist without being incorporated, why infer more than appears upon the face of the contract? Suppose the defendant had brought an action against the agent of this company on a contract made with him, could the agent set up as a defense that by the terms of the contract the defendant had admitted that he not only acted as agent, but that he was duly constituted such agent? Certainly not. It is well settled that he must plead and prove his authority, so as to give a remedy against the company (19 Johns., 60; 13 *id.*, 307; 1 Cow., 536), and this must generally involve proof of the legal existence of the corporation. The contract on its face would show that he acted as agent, and show the nature and extent of his powers. So in this case, the receipt and contract show the fact of an association, acting under a particular name. So

much appears on the face of the contract, and may be said to be admitted, but that is not enough for plaintiffs; it must also appear that they had legal authority and capacity thus to act, and to prosecute suits by such name, before their suit can be entertained."

In Davis *vs.* Stevens, 104 Fed. Rep., 235, the court says:

"This section, as I understand it, simply declares the law in the same manner that the courts declare it. It pre-supposes that there is a *de facto* corporation, which cannot exist if there could have existed no *de jure* corporation. In the case of Oroville & V. R. Co. *v.* Supervisors of Plumas Co., 37 Cal., 354, it was held by the supreme court of California that a similar provision in the laws of that State did not go to the extent of precluding private persons from denying the existence *de jure* or *de facto* of the alleged corporation. In sec. 506, 1 Thomp., it is stated:

"'The simple and true view is that if men undertake to form themselves into a business company which the State cannot recognize as a corporation, or which is even forbidden by the State, and in that character contract debts which would be valid and enforcible if contracted by individuals, the courts of justice should hold them liable as partners. It is intolerable that A. B. & C., by merely assuming a corporate name and pretending to be a corporation, can incur with innocent members of the public obligations which would be valid if incurred by them individually, and then escape liability because the law forbids them to act as a corporation in the incurring of such obligations. A simple rule, and one which applies in all cases, is that, where the obligations of a pretended corporation are neither inequitable nor immoral, the judicial courts should enforce them against the corporations as partners. So to do would be strictly consonant with public policy, because, if business adventurers learn that, unless their corporate organization is lawful and valid, they are liable as partners, this will deter them from attempting to form illegal or prohibited corporations.'"

In Wechselberg *vs.* Flour City Nat. Bank, 64 Fed. Rep., 90, the court says:

"The statute must be considered in its entirety to ascertain its meaning, and that exposition ought to be adopted as

stated by Mr. Justice Story, in Minor *v.* Bank, 1 Pet., 46, 'which carries into effect the true intent and object of the legislature in the enactment.' The purpose is clear that corporate being shall be dated from and conferred through the act of filing the executed articles of incorporation for record as one of the conditions precedent; but, while the statute refers to it as a corporation at that stage, a limitation is added that it shall not exercise corporate functions, viz., 'the transaction of business with any others than its members,' until it shall have provided capital stock in conformity with section 1773. Such is the view recognized in Mining Co. *v.* Sherman, 74 Wisc., 226; 42 N. W., 226; where it is said that this statute 'provides for the preliminary organization of the corporation, and then limits its power to enter upon its general business,' by section 1773. The corporation has obtained the right to exist, but can only be said to have existed in a qualified sense, for it is not possessed of the attributes or privileges of perfected incorporation; and section 1775, which declares these powers and privileges, vests them only when organized as required by the preceding sections. A quotation from the brief of one of the learned counsel for the plaintiff in error (arguing against liability as a stockholder) well defines this embryonic status, and is adopted here. It reads (including italics) as follows: 'The truth is that no corporation was formed except in a very limited and qualified sense. It is true the statute uses the word 'corporation.' It is, however, a bare, legal entity, which through organization may become a corporation, having members, and capable of transacting business. * * * It may be likened to the hull of a ship, without rudder or masts or gearings.

"The public are authorized to treat it as a corporation from the recording of the articles, and may look to the recorded articles for its purposes and objects. Compliance with section 1773 is imposed upon the corporators in the first instance, and when they have provided for stockholders the duty devolves upon the latter, whose action is matter only of corporate record, and not of general public record. Until this provision of capital is furnished to take the place of personal liability, the intention is apparent to withhold the special privilege of complete incorporation which exempts the members from liability. The inhibition is, in effect, against any transactions except such as tend to organization, *i. e.*,

perfecting incorporation,—and the purpose is to protect those who may be imposed upon by premature assumption of corporate functions, and not to save the corporation or its projectors from just liability. Mining Co. *v.* Sherman, *supra*. This is not like the technical requirement placed by a Michigan statute upon the officers to file their articles of association in a certain place, simply forbidding business until compliance, without declaring effect for non-compliance—of which it was held in Whitney *v.* Wyman, 101 U. S., 392, that the provision was not made a condition precedent to incorporation; and it is not like the technical requirement found in the former Wisconsin statute that the officers should file a certificate of incorporation before transacting business, held in Harrod *v.* Hamer, *supra*, not a condition precedent; but the demand here is of the very essence of incorporation—that there shall be capital stock and stockholders. A corporation cannot come into existence without members, and stockholders are the only members of a stock corporation."

III.

The plaintiff below is bound by the contract made by W. L. Wells, and the defendant is entitled to a credit on the purchase-money by reason of the subscription to the stock.

A. The taking of the stock in part payment of the price of the cotton was not ultra vires.

(1.) *The taking of the stock by the defendant in part payment of the price was a mere incident of the transaction in regard to the sale of the cotton, and, therefore, was infra vires.*

This court says (Simonton, J.), in Insulated Wire Co. *vs.* Mayor, etc., 74 Fed. Rep., 363:

"Is the contract in question within the scope of the charter of the plaintiff? The rule laid down by the Supreme Court upon this subject is clear. In Green Bay & M. R. Co. *vs.* Union Steamboat Co., 107 U. S., 98; 2 Supt. Ct., 221, it is thus expressed:

"'The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond these powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited.'"

The same rule is followed and illustrated in Ft. Worth City Co. *vs.* Smith Bridge Co., 151 U. S., 294; 14 Sup. Ct., 339. The same rule was recognized and applied in Navigation Co. *vs.* Hooper, 160 U. S., 524; 16 Sup. Ct., 379. The court quote with approval the language of Lord Selbourne, Ch., in Attorney General *vs.* Great Eastern Ry. Co., 5 App. Cas., 473:

"This doctrine (*ultra vires*) ought to be reasonably, and not unreasonably, understood and applied; and whatever may fairly regarded as incidental to or consequential upon those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*."

The court also adopts and quotes the language of Bigelow, C. J., in Brown *vs.* Winnisimet Co., 11 Allen, 326:

"We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings and transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

In Bancroft & Sons *vs.* Bloede, 106 Fed. Rep., 396 (at p. 399), this court says:

"But the purchase of stock by a corporation in other corporations, such purchase being incidental to its business, is

not unlawful. First National Bank *vs.* National Exchange Bank, 92 U. S., 122."

B. & L. Ass'n vs. Ebaugh, 185 U. S., 120.
Meares vs. Imp. Co., 126 N. C., 662.
Germania Nat. Bank vs. Case, 99 U. S., 628.

"The legality of the transaction could not have depended upon the intention of the corporation to wind up its affairs immediately. If it had taken the stock in payment for goods, or for the sale of a building or land or water power which it did not want or desired to sell, while it still carried on its business, the act must have been equally legal. We have no occasion to say how it would have been if the stock had been purchased for permanent investment. If such a question should arise, it would require much consideration. A great part of the business of the community is done by means of corporate organizations. It would be difficult for many of them to manage their business and collect their debts if they could not, at least temporarily, hold the stock of other corporations. Some of them, as savings banks, for example, are restrained by statute. But corporations established for manufacturing and trade are under no statute restrictions which can apply to a case like the present."

Howe vs. Boston Carpet Co., 16 Gray, 495, 496.

"It is well settled in this country that one corporation is prohibited from investing its property in the capital stock of another unless there is express power to do it, or unless there is something peculiar in the express powers from which it can be fairly implied. * * * This does not prevent a corporation from receiving the stock of another in payment of, or in security for debt in due course of business (Howe *v.* Carpet Co., 16 Gray, 493), but it prevents a deliberate and permanent investment of a corporation's assets in the stock of another."

Marbury vs. Kentucky U. L. Co., 62 Fed., 351, 352.

III.

A. The taking of the stock in part payment of the price of the cotton was not ultra vires.

2. *If the taking of the stock in part payment of the price of the cotton was not a mere incident of the sale by plaintiff to defendant, and therefore infra vires originally, the contract as between Wells Company and the defendant was fully executed, and the doctrine of ultra vires does not apply. The cotton had been sold and delivered and the money actually paid by defendant to the Loray mills for the stock.*

In Marbury *vs.* K. U. L. Co., the court says:

* * * "But it is claimed that the contracts having been executed, equity will not set them aside, even though they were *ultra vires.* * * * Moreover, the stock and lands received for the land had been pledged by the land company to secure debts of its own. It is therefore apparent that, not only have all the contracts for the exchange of land for stock been executed, but that third persons, not parties to the intervening petition of Marbury & Jones, have invested money on the faith of the grants of the land on the one side and of the land company's ownership of the stock on the other. * * * We are very clear that it would be inequitable to set aside the transactions here complained of in the absence of the third persons who have advanced money on the faith of their validity, and who have not been tendered the money advanced by them on the stock or invested by them in the lands sought to be recovered."

Marbury vs. Kentucky Union Land Co., 62 Fed., 351, 352.

"Admitting that the South & North Alabama Railroad Company had no authority under its charter to issue this stock, and that the Louisville & Nashville Railroad Company had no authority under its charter to purchase and hold it, still the charters of the respective companies did not forbid it, and the rule is, that contracts which, though in-

valid for want of corporate power, yet, if fully executed, they shall remain as the foundation of rights acquired by the transaction. * * * Thomas *v.* Railroad Co., 101 U. S., 82, in which it is said: 'The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.'"

Taylor vs. S. & N. Alabama R. Co., 13 Fed., 155.

"Another complete and perfect answer to the objection urged is that the defendants, having reaped the benefits arising from the contract, cannot, under the plea of *ultra vires*, seek to defraud the other parties. Even although it may have been made without express authority, the contract must be allowed to stand as the plainest rules of good faith demand. (Castle *v.* Lewis, 78 N. Y., 131.) The rule is well settled that the plea of *ultra vires*, should not, as a general rule, prevail, whether interposed for, or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."

The Rider Life Raft Co. vs. Roach, 97 N. Y., 381.

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party and the corporation has had the full benefit of the performance and of the contract."

Whitney Arms Co. vs. Barlow, 63 N. Y., 70.

"The defendants claim that the sale made by the corporation was void for want of authority inasmuch as the statute in regard to manufacturing corporations requires that there shall not be less than three trustees and three stockholders, and as there are only two, the corporation could not pledge the property. * * * The corporation received the money loaned from the plaintiff's assignor, and gave title to the property in question for the purpose of securing the same. Although only two trustees acted in making the arrangement, this fact does not authorize the corporation to set up such a defense against the plaintiff's demand. Having received the benefit of the contract which has been executed, even although it may have been made without express authority, it must be allowed to stand, as the plainest rules of good faith demand."

Castle vs. Lewis, 78 N. Y., 134.

"The contract by which the St. Louis, Vandalia & Terre Haute Railroad Company conveyed its railroad and franchises to the Terre Haute & Indianapolis Railroad Company was void as beyond the latter's corporate powers; and both parties were *in pari delicto;* and the invalidity of the conveyance, in view of the laws of which both parties were bound to take notice, was apparent on its face; and it having been executed by both parties, the former has no right to invoke the assistance of a court of equity to set it aside; and so far as it can be considered as representing the stockholders and seeking to protect their interest, it and they are barred by laches in this case."

St. Louis, V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S., 393.

"Nor can the corporation defend itself against a claim for money, paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires;* although the plaintiff, when he paid the money, knew all the facts." (Head-note.) (From opinion.) "Contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, I am willing to agree, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and, therefore, a breach of private trust. But the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith so require."

Parish vs. Wheeler, 22 N. Y., 494, 508.

"It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

"And in regard to corporations the rule has been well laid down by Comstock, Ch. J., in Parish *v.* Wheeler, 22 N. Y., 494, that the executed dealings of corporations must be

allowed to stand for and against both parties when the plainest rules of good faith require it."

Thomas vs. West Jersey R. R. Co., 101 U. S., 71.

In the case of Cincinnati H. & D. R. R. Co. *vs.* McKean, 64 Fed., 36, plaintiff sought to have canceled a contract made by one Ives, its vice-president, by authority of its stockholders and directors, with defendant, and to recover for money paid by said Ives to defendant for twenty thousand shares of stock in another railroad company, purchased for its use and benefit, upon the ground that said contract was *ultra vires*. Held by Harlan, J., that as the contract had been fully executed by the parties, plaintiff was not entitled to the relief demanded (citing Thomas *vs.* R. R., 101 U. S., 71, and other cases).

"Besides, the contract having been fully executed by the plaintiffs, the corporation cannot, while retaining the benefit of it, assert that it had no power to make a contract, the consideration of which it has received. State Board, etc., *v.* Railway, 47 Ind., 407, and cases cited; Chicago, etc., Co. *v.* Derkes, 103 Ind., 520; 3 N. E. Rep., 239. The rule requiring the observance of good faith and fair dealing is applicable to corporations as to individuals. Neither can involve others in onerous engagements, and with the consideration of the contract in their possession, disavow their acts to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract."

Louisville, N. A. & C. Ry. Co. vs. Flannagan (Ind.), 14 N. E., 374.

"The Oil Creek & Allegheny River Railroad Co. agreed to pay the Pennsylvania Transportation Co., an oil pipe line, a certain sum per barrel on all oil transported by it in consideration that the pipe line would deliver all the oil under its control to the railroad company for transportation; the pipe line performed its part of the agreement and brought suit to recover the price agreed on. Held, that the railroad company could not set up as a defense that the contract was *ultra vires*." (Head-note.) * * * (From opinion.) "It

does not appear to have occurred to the defendants below that the contract of July 26, 1871, was *ultra vires* until it became apparent that by their subsequent modification of it they had made a bad bargain. * * * We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There are mutual covenants and mutual advantages. The defendants had enjoyed the advantages, such as they were. To the extent of the demand in this suit the contract was executed, and to say now that it was *ultra vires* comes with an exceedingly bad grace from the defendants."

Oil Creek & A. R. Co. vs. Penna. Trans. Co., 83 Pa. St., 160 and 166.

"The appellee sold to the appellant, and received and used the proceeds of the notes in its business. It continues to do so, and we hardly need cite authority in support of the chancellor's conclusion that the transaction was not void for want of authority on the part of the appellee's president to discount the paper. The corporation cannot hold on to the money, and repudiate the acts by which it got it."

German Nat. Bank vs. Louisville Butchers Hide & T. Co., 29 S. W. (Ky.), 884.

"Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not prevail where it would defeat the ends of justice or work a legal wrong."

The Ohio & Miss. Ry. Co. vs. McCarthy, 96 U. S., 258.

"The law never sustains a defense of this nature out of regard for a defendant; it does so only where an imperative rule of public policy requires it. The instances are rare in which a corporation or individual has been permitted to set up its own wrong in order to retain both the property and its price. The defendant corporations have obtained the stock which they now allege they had no right to buy, and propose to retain it without payment. It would be difficult to imagine a defendant with less merit, and the law would be exceedingly impotent were it to allow it to succeed. * * * After the plaintiffs had made out their case the defendants set up their want of corporate power to buy the stock, by way of defense. This with the stock transferred

to them and unpaid for. The effect of this defense, if successful, would be to punish innocent parties who had no connection with the illegal transaction for the wrongful act of the defendant corporations.

"It may be that as between the original parties the defendants could have rescinded the contract and declined to receive the stock. But they executed it; they accepted the stock and gave their note in payment, for which note the plaintiffs paid value in good faith. The defense of *ultra vires* by a corporation comes with a better grace if made before it has discovered that it has made a bad bargain."

Wright vs. Pipe Line Co., 47 Am. Rep. (Pa.), 702 and 703.

"I agree with the counsel for the defendants that this company had no authority to purchase or deal in these bonds. But since the decision in Moss v. The Rossie Lead Mining Company, 5 Hill, 137, I do not see that a corporation can ever avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase. And if the company was bound, I see no reason why the defendants should not also be bound by the contract."

State of Indiana vs. Woram, 40 Am. Dec. (N. Y.), 380.

III.

B. *W. L. Wells had original authority to make the contract, including the stipulation as to the stock of the Loray mills.*

As W. L. Wells was, at the time of making the contract, the president and general manager of the Wells Co., he had necessarily full power to enter into the contract, and the plaintiffs were bound in all respects by his actions in that behalf.

"A corporation is liable on a contract made by its general manager within the scope of its business."

Clowe vs. Imp. P. P. Co., 114 N. C., 304.

In Sun P. & P. Ass'n *vs.* Moore, 183 U. S., 642, the court says:

"The managing editor of a newspaper, charged with the full control of the business of collecting news, and impliedly vested with power to enter into contracts in respect thereto, is, in effect, a general officer of the newspaper corporation as to such matters, and as such has power *prima facie* to do any act which the directors or trustees of the corporation can authorize or ratify."

In First Nat. Bank *vs.* V. V. G. & V. B. Min. Co., 89 Fed., 439, the court says:

"The authority which the public may presume is lodged with an officer of a corporation depends much upon the nature of the office and the character and general objects of the corporation. When an officer is given general authority to manage its business, and especially when he is one of its *chief officers*, his presumed authority is extended to include any act that can be necessary in the conduct of its business, or that can tend to the promotion of its objects. This presumption of authority is increased when such officer is managing the business at a place remote from the home or the chief office of the corporation. Any act by a corporate officer inuring to the advantage of the corporation, or the benefit of which it receives and appropriates without objection or disaffirmance, even when it may have been beyond the authority of the officer, binds it. Not only must a corporation, through its directors or managing board, within a reasonable time disaffirm any contract made by any of its officers beyond the limits of their authority, but it is so much the duty of such board to know what its officers do that ignorance thereof cannot be urged as a justification for failure to disaffirm. That like prior transactions have passed unchallenged justifies a presumption of authority in the officer making them. In consideration of the manner in which corporations are now largely organized and operated, strength is added to these presumptions. Probably the majority of those organized in recent years are for the purpose of operating some small mercantile, mining or other pursuit, in which a very few interested parties constitute the chief officers who manage the business; while a few parties,

often having little, if any interest in its affairs, constitute the managing board, and in law the corporation, but in fact are merely perfunctory officials, who, instead of managing, are managed. Such corporations should be dealt with as they deal with the public. The acts of their chief officers who manage the business, and are permitted to do so by their "decoy" directors, should be deemed the acts of the corporation. It would be monstrous to permit escape from responsibility in such cases by the pretense that such acts are *ultra vires*."

In McKenzie *vs.* Poorman Silver Mines of Colorado, 88 Fed., 112, the court says:

"In an action against a corporation on a contract made between plaintiff and a third person, who is alleged to have acted in behalf of the corporation, it is not necessary to show that the contract was made under authority of a resolution of the board of directors; and, if there is evidence tending to show that it was made in the interest of the corporation, which recognized it, accepted its benefits, and acted on its provisions, this is sufficient to warrant the submission of the cause to the jury."

In the case of G. V. B. Mining Co. *vs.* First Nat. Bank, 95 Fed., 27, the facts were that Bryan and Venable, owning certain mining property, incorporated the G. V. B. Mining Co., transferred the mining property to it in exchange for all its capital stock, a part of which they assigned to certain other parties in New York State for the purpose of organizing the company. Bryan was elected president, Howard secretary and Thurber treasurer of the company. Subsequently, in violation of the statute of New York State requiring the written assent of two-thirds of its stockholders, Bryan executed a mortgage on the company's property to secure debts due the bank for money used partly by the company and partly by Bryan and Venable individually, of which fact the bank had notice. Venable gave his written assent to this mortgage. At the time of its execution Bryan and Venable owned more than two-thirds of its capital stock

and had entire charge of its business. In upholding the validity of the mortgage the circuit court of appeals said:

* * * "We are of opinion that, at the outset, some distinction ought to be made between genuine, *bona fide* corporations, organized for the legitimate purpose of conducting a business which requires a combination of persons and of capital, to make the business successful, as distinguished from the character of a corporation organized and conducted, as this was, with a view to conduct and carry on the business in the same manner and way as if no corporation, in fact, had been formed. In the early history of the transactions, Bryan and Venable were in fact the corporation. They acted in the same manner—transacted business in the same way—as well after, as before, the corporation was formed. The court ought not overlook these peculiar facts and conditions. In endeavoring to sustain and uphold a law made for the protection of innocent stockholders, we should be careful not to announce a doctrine that would permit the leading stockholders, under the guise of a corporate name, to commit frauds by taking advantage of their own wrong. While Bryan and Venable were directors in name, they were also the principal stockholders in fact, and were merely using the corporate name for advantage and benefits which they might themselves derive therefrom. * * *

"In the light of the entire history of the corporation, as shown by the record in this case, it might be, perhaps, more properly said that Bryan, until January 11, 1895, by the consent of all parties interested and concerned, and H. K. Thurber thereafter, were to all intents and purposes the G. V. B. Mining Company; that, as was said by the circuit court, 'the so-called directors and officers in New York constituted simply the dumb machinery entirely directed by these parties, and through whom they operated when it was necessary to invoke the legal status of the corporation to strengthen their hands or advance their objects.' * * *

"In the consideration of the legal questions herein presented, it must constantly be borne in mind that we are confining ourselves to the peculiar facts established by the evidence as distinguished from the general principles applicable to the power of officers to bind the corporation. We are called upon to deal solely with exceptions to the general rule. In this view it becomes unnecessary to discuss the

various authorities cited by appellant's counsel as to the general manner in which corporations are legally authorized to transact their business. The vital question is whether, from the manner in which the G. V. B. Mining Company transacted its business, it can take advantage of its acts against the appellee. We are of opinion that, from the facts it cannot do so.

"Where the president of a corporation is given full power and authority to conduct and manage its business, and deal with the property and affairs of the corporation in such a manner, and for such a length of time, as to justify others with whom he transacts business in believing that he had authority to do the acts in the manner and way performed by him, the people with whom he transacts business have the right to deal with him upon the assumption that he has such authority; and the corporation, having knowledge of the exercise of such acts, and of the manner in which the corporate business was transacted, cannot thereafter, to the injury and prejudice of such parties, deny his authority or disaffirm or set aside his acts."

In the case of *Burton, receiver, vs. Burley, receiver*, 13 Fed., 811, the facts were that the City National Bank of Chicago was a regular correspondent of the First National Bank of La Crosse. It was the custom of the Chicago bank to transmit regularly copies of the account between the two banks to the La Crosse bank, and, if error was detected, the latter bank gave due notice thereof. One Sutor (formerly connected with the Chicago bank), moved to La Crosse and became president of the La Crosse bank, having obtained control of its affairs. Sutor owed the Chicago bank $7,000, evidenced by his note, and when he became president of the La Crosse bank, paid this amount from time to time by instructing the Chicago bank to charge different amounts to the La Crosse bank, to be credited upon his note. He also paid a note of one Minor (cashier of the Chicago bank), which he had assumed in the same way. All these transactions were duly entered upon the books of the Chicago bank and appeared upon the various statements sent by it to the

La Crosse bank. The La Crosse bank acknowledged the correctness of these statements, but failed to enter the transactions upon its books. Sutor was a man of small means and had, in fact, no authority to apply the funds of the La Crosse bank to the payment of his individual debts. In holding that the La Crosse bank was bound by the transaction, the court said:

"So that, in any view that I can take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of the business which has been done. *Non constat* but that, admitting all that is claimed on the part of the plaintiff, Mr. Sutor may have presumptively made some arrangement justifying his action with his own bank. The natural presumption that would arise in the minds of the officers of the city bank was that Mr. Sutor had made some transactions with the La Crosse bank by which he was authorized to act and by which the La Crosse bank had assumed the individual debt which Sutor owed to the City national bank. If the defendant insists the court must certify to the balance due from the La Crosse bank to the city bank, because I hold that these items of account which are the subject of controversy constitute a valid charge against the La Crosse national bank."

In the case of Armstrong, receiver, *vs.* Chemical Bank, 83 Fed. Rep., 556, the circuit court of appeals, by Taft, circuit judge, said:

"We think that for practical purposes Harper was the bank, and that the directors recognized him as such and that, included in such a delegation of authority as this condition of affairs implies, was the power to borrow money, if, as held in the Western Bank case, that power rests with the directors." * * * "In Martin *v.* Webb, 110 U. S., 428, the issue was whether a bank was bound by the act of its cashier in having canceled the obligation of its debtor secured by a first lien on his property in exchange for a partial payment on that and new obligations secured by a second lien." * * *

"Mr. Justice Harlan, delivering the opinion of the court, set out at some length the circumstances to show that, in fact,

the whole business of the bank had been delegated to the cashier by the directors, whose supervision over him was most perfunctory, and who were very little in the bank, and, that, if the directors did not abdicate all authority as such, they acquiesced in the cashier's assumption of exclusive management of the bank's business, and held that the directors and the bank could not be heard to deny the requisite authority in the case in hand."

See also:

Union G. M. Co. vs. Bank, 96 U. S., 640.
Sherman vs. Ficht, 98 Mass., 59–64.
White vs. Creamery Co., 74 N. W., 283.

III.

C. The contract was ratified by the subsequent dealings and correspondence between the parties, as shown by the oral evidence and exhibits.

(1.) *The plaintiffs received a benefit from the sale of the cotton, in the way of large profits, which they retain, and having thus ratified that part of the contract which favored them, they thereby ratified the whole.*

Where the principal seeks to enforce an unauthorized contract made by his agent, the benefits of which he received and retains, he thereby adopts and makes his own such contract, in its entirety, and will not be permitted to accept its benefits and reject its burdens.

In the case of Myra Clark Gaines *vs.* Miller, 111 U. S., 395 (28 Law Ed., 466), the facts were that Relf and Chew began to act as executors of the estate of Daniel Clark *in their own wrong* in the year 1811, and by power of attorney appointed Hammond their agent to sell certain lands in the State of Missouri, belonging to said estate. Hammond sold, collected the purchase-money and absconded without ever having

accounted therefor to his principals, who subsequently obtained judgment against him for the money so received as their agent. After more than twenty years' litigation the last will and testament of Daniel Clark was admitted to probate in 1856 and the plaintiff, the executrix, named therein, duly qualified as such. In 1879 letters of administration were granted to Miller upon the estate of Hammond, in the State of Missouri. This action was brought to recover from Hammond's estate the amount of the purchase-money received by him from the sale of the Daniel Clark land as the agent of Relf and Chew, the wrongful executors of the said estate. In denying the right of the plaintiff to recover, the court said:

"The second ground of demurrer is also well taken. The appellant by ratifying the sale made by Relf and Chew, through their agent, Hammond, ratified the acts of Relf and Chew in respect to the purchase-money received by Hammond. If Hammond, as their agent, had paid over to them the money received from the sales made by him, the appellant could not, having ratified the sale, repudiate the payment. If a principal ratifies that which favors him, he ratifies the whole. (Citing authorities.) By ratifying the sale, the appellant places herself in the position of Relf and Chew, and Hammond has the same rights against her as he had against them."

Same court said in another case:

"The position of counsel that the ratification, if sustained, only extended to the conversion of the bonds, and merely operated to deprive the transaction of its tortious aspect, all else consisting of dealings by Homans with his own property is not tenable. The answer to it is, that the ratification was of the whole transaction taken together; that of the appropriation of the bonds upon substituting an equivalent in value for them, not of a part without the rest, not of the appropriation without the substitution."

Cook vs. Tullis, 18 Wall., 332 (21 Law Ed., 937).

"It seems to us very clear that if the plaintiff's property was sold by a person assuming to act for him, but without

authority, in an action against the purchaser, if the plaintiff waives the tort, and ratifies the contract, he must ratify it as the agent has made it. Otherwise he can only sue for the property itself, or in tort, for damages for the unlawful conversion. He cannot ratify a part of the contract made on his behalf, and repudiate the rest."

Brigham vs. Palmer, 3d Allen (Mass.), p. 453.

"*A person cannot ratify that part of a contract* made for him by an unauthorized agent which makes for his interest and renounce that which makes against it.

"*Keeping part of the goods left for a person with an unauthorized agent*, who assumed to accept them in discharge of a contract obligation, which the other party had the option to discharge either in goods or in money, ratifies the act of the agent in accepting the goods, and prevents any rejection of other portions of the goods."

Daniels vs. Brodie (Ark.), 11 L. R. A., p. 81.
P. & C. R. R. Co. vs. Keokuk Bridge Co., 131 U. S., 371.
Clark vs. Reeder, 158 U. S., 505.
Owens vs. B. L. Co., 28 S. E. Rep., 950.
Wheeler & Wilson vs. Auchy, 22 Atl. Rep., 667.
4 *Thompson on Corp.*, sect. 5303.
5 *Thompson on Corp.*, sect. 6016–17–18.

III.

C. The contract was ratified by the subsequent dealings and correspondence between the parties, as shown by the oral evidence and exhibits.

(2.) *The plaintiff had notice of the terms of the contract between defendant and its agent, W. L. Wells, and did not repudiate the same, but acquiesced therein by its silence.*

The plaintiff, Wells Company, had notice of the terms of the contract under which the cotton was sold, when their letter to John F. Love, treasurer, dated August 31, 1900, was returned to them. This letter was sent by W. L. Wells

Company to John F. Love, treasurer of defendant, and in it a demand for the payment of $12,691.37 by the defendant to them was made. (See Exhibit D, page 59 of Record.) This letter was returned by John F. Love to the Wells Company, with a credit of "$10,000.00 for Loray stock" entered upon it and deducted from the amount claimed by Wells Company in that letter. This was quite sufficient to give Wells Company notice that defendant was claiming a credit for that amount ($10,000.00) on account of the stock of the Loray mills. If the Wells Company did not understand what this entry of a credit of $10,000.00 meant, they should have inquired, and the law presumes that they did so, as it was their duty to do so, and that they acquired all the information and knowledge which that inquiry, if duly prosecuted, would have disclosed; and, from their failure to reject or repudiate the contract for many months after that letter was received, if they were unwilling to be bound by it, the law conclusively infers their acquiescence and assent to the contract, and they will not now be heard to say that they are not bound by all of the terms thereof.

Bement vs. Armstrong (Tenn.), 39 S. W., 899.
Union G. M. Co. vs. Bank, 96 U. S., 640.
Field vs. Farrington, 10 Wall., 141.

The defendants below contend that the admitted facts show that John F. Love *gave the Wells Company notice in August, 1900, that $10,000*, due by said defendants to that company for cotton sold for the season of 1899–1900, *had been applied to the payment of the Loray stock;* that John T. Wells *admitted* that he received this notice (Exhibit D), and that *from that time* until *August 12th, 1901*, neither he nor any other officer of the company *ever made any demand* upon the defendants below for this amount, or said anything to W. L. Wells concerning it; that subsequently, on Dec. 3d, 1900, defendants settled for all cotton shipped them, up to that time, for the season, 1900–1901, invoices of

which were marked paid by the Wells Company, *and no mention was made of the $10,000 item;* that from Dec. 18th, 1900, to Jan. 31st, 1901, the Wells Company made *three several demands* upon the defendants for *payments* on account of cotton shipped during the months of Nov. and Dec., 1900, *being so urgent in said demands that W. L. Wells individually wired John F. Love on the 31st of January, 1901,* for a remittance (see letters Dec. 18th, p. 134, Jan. 2d, p. 137, and telegram Jan. 31st, p. 138); that *John F. Love wrote W. L. Wells on Feb. 2d, 1901, two days after the receipt of said telegram, that he had applied $50,000 of the amount, due by said defendants to the Wells Company for cotton, to the subscription for the Loray stock,* and *requested Wells to have his house* (the Wells Co.) *credit the defendants' account with that amount* (Exhibit T); that at this time, according to the *present* contention of the Wells Company, the defendants owed that company something like $65,000.00; that *after* the receipt of the letter of February 2d, *neither W. L. Wells nor any other member of the Wells Company ever made any demand upon the defendants for this large sum of money, until August 12th, 1901* (*p. 57*), *after the reorganization of the Loray mills;* that from Feb. 2d to August 12th, 1901, the Wells Company sold said defendants large quantities of cotton, for cash or acceptances, about which said parties had *frequent correspondence,* in which *no mention* was ever made of this large balance, which said defendants certainly owed the Wells Company, unless said $50,000.00 had been properly applied to the payment for the Loray stock; that during the season of 1899–1900 the Wells Company regularly rendered the defendants monthly statements, showing the balance due the former by the latter at the end of each month, and frequently demanded payment of such balances, but *failed to render any such statements from Feb. 2d to Aug. 12th, 1901;* that during the season of 1900–1901, the Wells Company, *upon W. L. Wells' individual credit, owed its bank upon an average of*

$128,000.00, money borrowed with which to carry on its business (pp. 29, 30 and 37).

The defendants below contend that these undisputed facts more than warrant the following conclusions: (1) *That the Wells Company had notice in August, 1900, that Love had paid $10,000.00* (the balance then due on the cotton transactions for that season) *on the stock subscription to the Loray mills:* (2) that the Wells Company by its failure to repudiate said transaction for twelve months is thereby conclusively presumed to have ratified the same: (3) *that the individual letter written by Love to W. L. Wells on Feb. 2d, 1901, in which he notified Wells that he had applied $50,000.00 to the payment for the Loray stock, and requested him to have the Wells Company credit defendants' account with said amount, was constructive notice to the Wells Company of that transaction,* it being *written about the business of said company* and, in effect, in reply to Wells' telegram of Jan. 31st: (4) *that the failure of any officers of the Wells Company to make demand upon defendants for this large sum of money for six months was at least strong evidence that said company had actual notice of the application of the same by John F. Love to the payment for the Loray stock and that it assented to such payment:* (5) that considering the *manner* in which the parties conducted all prior dealing between themselves, and *particularly* the *fact that theretofore the Wells Company had rendered regular monthly statements to said defendants and frequently and persistently demanded payments of the balances thus shown to be due,* THE DEAD SILENCE OF THE WELLS COMPANY FROM FEB. 2D TO AUG. 12TH, 1901, concerning the non-payment of this large amount of money, *when it owed its own bank something like $128,000.00, is utterly inconsistent* with the plaintiffs' *present* contention that *it had no notice that $50,000.00 of said indebtedness had been applied by Love in payment for the Loray stock.*

(1–2.) "Exhibit D" was a letter addressed by the Wells Company to John F. Love, treasurer, dated Aug. 31st, 1900

and recited the enclosure of an account showing a balance of $12,691.67 due the Wells Company by said defendants and asked for remittance by return mail. On the bottom of this letter was endorsed by John F. Love the following:

"$10,000.00 stock Loray mills.
" 2,691.67 interest.

"$12,691.67 balance.

"We want to see your Mr. W. L. Wells about it when he comes to see us."

John T. Wells admitted receiving this letter and filing it among the papers of the company (p. 22) and also that from the date of its receipt until Aug. 12th, 1901, neither he nor any other member of his company rendered defendants below a statement of, or made demand for, this money, or even mentioned the matter to W. L. Wells (p. 23). These facts we submit conclusively fix the Wells Company with notice that, by some arrangement between W. L. Wells and John F. Love, $10,000.00 of its money had been applied in payment for that amount of stock in the Loray mills, subscribed for by W. L. Wells, either for the company or for himself individually. With this *notice* the *silence* of the Wells Company for *twelve months* was a *complete ratification* of the arrangement between W. L. Wells and John F. Love, by which the Loray Mills stock was subscribed, and paid for out of the funds of the Wells Company.

To have avoided this legal result, the Wells Company, upon receipt of this notice, should have promptly notified Love that it would not consent to his application of this $10,000.00 in payment for said stock. For this position we quote from the following authorities:

In the case of Field *vs.* Farrington *et al.*, 10 Wal., 140 (19 Law. Ed., 923), the facts were that Field consigned certain cotton to Farrington, upon which money was advanced, and on October 28, 1865, he instructed Farrington to sell the

cotton. This the agent failed to do and on November 16th wrote Field informing him that he had not sold the cotton, the price of which had declined in the meantime.

Field purposely failed to answer this letter or to give his agent any further instruction. The cotton was subsequently sold and failed to bring enough to reimburse the agent for the moneys advanced. This action was brought against Field to recover the balance due on account of said advancements, and a counter-claim was set up by Field for the difference between what the cotton actually brought, and what it would have brought if it had been sold by the agent when directed by Field. In passing upon this question the court said:

"The effect of his refusal to reply to their letter within a reasonable time after he received it was, undoubtedly, to raise a presumption that he approved of what his factors had done, so far as their letter informed him. In the absence of anything to rebut that presumption, he must be regarded as having consented to whatever delay had occurred in effecting a sale, even though it was contrary to his directions. He could not, therefore, hold his factors responsible for the consequences of acts which he had ratified. * * * And in Story, Ag., sec. 259, it is said that: 'In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other to answer the same within a reasonable time; and if he does not, it is presumed he admits the propriety of the acts of his correspondence, and confirms and adopts them.'"

And in another case involving this question, the court said:

"This matter was reported to the directors. They had a meeting upon the subject some six weeks after the whole thing had been consummated and after they had received the benefits of the release by the payment of their drafts. The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent requires that if they had a right to disaffirm it they should do it promptly, and, if after

a reasonable time they did not disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance it came too late, as it was commenced some six months after they had knowledge of the release."

Ind. Rolling Mills vs. R. R. Co., 120 U. S., 256 (30 Law Ed.), 639.

"Where the agent acting for the best interest of his distant principal as he supposed, under the circumstances, had nevertheless gone beyond the letter of his instructions, if the principal did not choose to affirm the act, it was his duty when informed of the agent's act to give immediate information of his repudiation.

"He cannot by holding his peace and apparent acquiescence, have the benefit of the contract if it should afterwards turn out to be profitable, and retain a right to repudiate it, if otherwise."

Law vs. Cross, 66 U. S., p. 533 (17 Law. Ed., 185).
Bemit vs. Armstrong (Tenn.), 39 S. W., 899.
Goddard *vs.* Foster, 17 Wallace, 123. Duty of court to construe letter and correspondence.

(3.) Was the individual letter (Exhibit T) written by Love to W. L. Wells on February 2, 1901, notice to the Wells Company? It was, in fact, a reply to the telegram of W. L. Wells of January 31st, demanding remittance for cotton sold and unequivocally stated that "I have paid in your $50,000.00 stock and can send you certificates any time in any way you suggest, and before issuing them will await your advice. Please have our account with your house credited with this amount."

This was certainly notice to W. L. Wells, *who entered no word of protest*, or objection, to this application of $50,000 of his company's money, his only reply being a telegram of February 4th (p. 139) asking when Love expected "to or-

ganize and elect officers for the Loray." *Wells was then president, and owned one-half of the capital of his company, and furnished all the credit upon which it did business*, being, at that time, *endorser for it for something like* $128,000 *in his bank.* He *was rich*, the *other two members of his company having no financial rating whatever.* Then, why should it be *presumed* that he *withheld* this knowledge from his company? What had he to gain by doing so?

Conceding for the present, that he subscribed for this stock, in his own name, for his individual benefit, and applied his company's funds in payment therefor, *was this transaction such an one as he would naturally desire to conceal from the other members of his company?* If it was not, then, in law, notice to him was notice to his company.

But *he* makes answer to this contention by asserting that on October 4, 1900, he wrote a personal letter (Exhibit S) to Love in which he stated that "I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them. Hence in writing me about this, please mark your letters "Personal." In the same letter he also distinctly stated that he would take the $50,000.00 stock, "but want you, as stated when there, to let this come in on the last payments, say about January next."

Love says (pp. 95–96) that when W. L. Wells was at Gastonia in the latter part of September, 1900, he stated that if he subscribed for the $50,000.00 stock he expected it to be paid for out of whatever amounts the defendants might owe the Wells Company for cotton shipped, on or about "January next."

Conceding this to be true, this letter must be construed in the light of *this* evidence, the effect of which is, that Wells requested that the $50,000 stock subscribed for by him should be paid for out of whatever sum the defendants might owe the Wells Company January 1, 1901, for cotton.

Love says (pp. 70–71) that he understood Wells' letter to mean that *he did not wish the other members of his firm to know anything about the arrangement between him and Love, by which he was to move to Gastonia and become the purchasing agent of the Loray mills.* That he did not understand that Wells in that letter enjoined silence on his part *with reference to his stock subscription* in the Loray and the agreement to *pay for same out of funds of the Wells Company,* is conclusively shown by the fact that Love, in his letter of February 2d, requested Wells *to have his house credit the defendants' account with the* $50,000.00 *paid for the Loray stock.* If Love had understood that Wells desired to *conceal* from the Wells Company the *fact that he had subscribed for the Loray stock,* and that it was to be *paid for out of the funds of his company,* he *certainly would not* have made a request of Wells, *which he knew, if carried out, would disclose the very transaction* which Wells now claims was to be kept secret from his company.

We therefore contend that the agreement between these parties was not that the fact of the stock subscription by W. L. Wells, and the manner of its payment should be withheld from his company, but simply the fact that he contemplated moving to Gastonia and becoming the purchasing agent for the Loray mill.

If we are correct in this contention, then the letter of February 2d, from Love to Wells was notice to the Wells Company, in view of the fact that W. L. Wells could not possibly have had any *motive* in withholding the information therein contained from his own company. The peculiar facts of this case make it an exception to the general rule. *Wells was the company and the company was Wells. The interests of the two were identical.* If it be said that it was to his interest to conceal from the other two *nominal stockholders* the fact that he had appropriated $50,000.00 of the company's money, the answer is that at that very time he had, in effect, loaned the company $128,000.00, and it would have been a mere

matter of book-keeping to have adjusted the accounts between them. Where the reason for the rule does not exist, the rule itself cannot be invoked.

Anderson vs. Kinley (Iowa), 58 N. W., 910.

But, conceding that it was *originally* agreed that the *whole transaction* should be withheld from the Wells Company, yet it is perfectly apparent that *when Love wrote the letter of February* 2, 1901, he understood that the *time had come when there could no longer be secrecy about this matter;* for his request that Wells should have his company credit the defendants *with the* $50,000 *paid for the Loray stock*, was *totally inconsistent* with the idea that the *fact* of such stock subscription by W. L. Wells, and the manner of its payment *could longer be concealed from the company.* And, if W. L. Wells *failed* to comply with this request it was *his fraud* upon *his own company*, and not any fraud or misconduct on the part of Love, and *his company*, and *not* the *defendants*, should be held responsible therefor.

In support of this position we quote from the case of Anderson *vs.* Kinley, *supra*, where the court says:

"It is not practicable to set out the evidence which shows them, but it is sufficient to say that there does not seem to have been any very clear distinction between the affairs of Wilson and those of the company. Business seems to have been done in the name of either one, as suited his conveniences and purposes. No satisfactory account of the organization and business of the company is given, but Wilson appears to have owned and controlled a large part of the capital stock, if there was any, and he managed its affairs during the time in question largely according to his own inclinations, and to advance his own interests; and we think that the company was properly held chargeable with the knowledge of the conveyance in question which he possessed."

(4–5.) Why did the Wells Company, contrary to its uniform custom in dealing with the defendants below, fail for

twelve months, in the first instance, and six in the second, to make demand for this large sum of money, which it claims was all this time justly due it?

Why did all communications cease concerning these amounts after John Love wrote the endorsement on Exhibit D in August, 1900, and his letter of February 2, 1901, advising plaintiff that said amounts had been applied in payment for the Loray stock? Can this strange conduct of the Wells Company be explained upon any *reasonable theory other than that its officers had notice of the fact that Love had so applied this money?* Can a reasonable mind, in the light of all this evidence, reach any other conclusion? It is true John Wells stated in his evidence that during this time he frequently spoke to W. L. Wells about the non-payment of this large sum of money, and that the latter would reply, "They are hard up," but gave no other reason for this unusual indulgence. The correspondence shows that such an excuse never availed the defendants in their prior dealings with the Wells Company, and as a matter of business judgment the alleged financial embarrassment of the debtors should have furnished the *strongest motives to the officers of the Wells Company* for prompt action in collecting so large a claim—more than five times the amount of its entire capital stock.

We therefore contend that *if this question had been submitted to a jury it must have* reached the irresistible conclusion, despite the direct evidence of John Wells, to the contrary, that his company had *actual* notice of the payment of this money on the Loray stock. But passing by this question, and assuming that the officers of the Wells Company, other than W. L. Wells, had no *actual* notice of the application of this $50,000.00 to the payment for the Loray stock and also waiving the fact that the *Wells Company in this action, through W. L. Wells, its principal stockholder and president, is now seeking to take advantage of this alleged fraud perpetrated by him upon his company,* in withholding

this important information from the other stockholders, can officers of a corporation charged with the management of its affairs, thus *close their eyes* to their manifest duty, by *negligently failing to investigate such suspicious conduct on the part of their president*, and then come into court and be heard to say that they *did not have notice of facts*, which, *by due and proper inquiry, on their part, would have been disclosed?*

We submit, upon what we think is the highest authority, that they cannot. In the case of Martin *vs.* Webb, 110 U. S., p. 7, the court, in discussing this subject, says:

"Directors cannot, in justice to those who deal with the bank, *shut their eyes to what is going on around them.* It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision over its officers. They have something more to do than from time to time to elect officers of the bank and to make declarations of dividends. *That which they ought, by proper diligence, to have known* as to the general course of business in the bank, *they may be presumed to have known* in any contest between corporations, and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." (Italics ours.)

And again in the case of Armstrong *vs.* The Chemical Bank, 83 Fed., p. 573, the circuit court of appeals, by Taft, J., said:

"The general rule as to ratification is, as we conceive it, that a failure to repudiate the unauthorized act of an agent can never work a ratification of the act, unless the principal either has actual knowledge, *or by the exercise of due diligence would have had actual knowledge of the act. Now due diligence presupposes an affirmative duty owing from the principal to the other party to advise himself of the fact.*" (Italics ours.) * * *

"But where there is an existing relation between the principal and the other party, imposing on the former a *duty of knowledge* in respect to a class of facts which embraces the *unauthorized act*, then a *neglect* by the principal to *discharge the duty* and *inform* himself will have the *same effect as actual knowl-*

edge upon the issue of his ratification of the unauthorized act by estoppel. (Italics ours.) * * * The affirmative duty was thereby imposed upon the Fidelity bank to inform itself of the correctness of the items therein charged, and to object to the same if unwarranted or erroneous. *Negligence* in doing so was a failure of duty towards the Chemical bank and was the *equivalent of actual knowledge of those things which proper inquiry would have developed.* * * * The directors cannot rid themselves of *such notice by saying that their agents failed to communicate the facts to them.* * * * Now it might be that, if the agent who committed the fraud originally was the only person to make the examination, his failure to report it could be considered so much a part of this scheme to defraud, that notice to him would not be notice to the bank. But here no such difficulty arises. [It appearing that the other directors and officers of the bank might have discovered the facts constituting the fraudulent appropriation of the bank's funds by its agent.] * * * *In any event* we cannot presume that *such a discrepancy* would have been suppressed *if the president, who was certainly not privy to the fraud, had been exercising any care.*" (Italics ours.)

See also *Leather Manufacturers' Bank vs. Morgan*, 117 U. S., 96.

In the case of Kissam *et al.*, *vs.* Anderson, 145 U. S., 434, (36 Law. Ed., 765). the facts were that one Warner was first cashier and then president of the Albion bank, nearly all of the stock in which was owned by the estate of R. S. Borrows, of which Warner was executor. Including Warner, there were six directors of this bank which had a capital of two hundred thousand dollars. Warner dealt largely in stocks and other securities with Kissam, W. & Co., (plaintiffs in error), and during the course of these dealings between May 11, 1880, and August 26, 1881, as cashier or president of his bank, drew twelve different checks aggregating $103,000.00, upon the Third National Bank of New York, in favor of Kissam, W. & Co., for his own private account. During the said time Kissam, W. & Co. from time to time deposited to the credit of the Albion bank with the Third national bank sums aggregating $63,000.00.

The Third national in its regular monthly statements to the Albion bank, showed that these items had been paid for its account by Kissam, W. & Co., but most of *these statements were received by Warner and were never shown to any of the other officers of the bank.* In the meantime Warner drew from the Third national bank all the moneys so paid by Kissam, W. & Co. and misappropriated the same in his individual speculations. The receiver of the Albion bank contended that as Kissam, W. & Co. had *knowingly* received the funds of that bank and applied the same to the *individual indebtedness of Warner*, they were liable to said receiver therefor. Kissam, W. & Co. contended that they were not liable for the amounts they had *redeposited to the bank's credit* in the Third national. In holding with Kissam, W. & Co., the court, discussing the question of *notice* to the Albion bank of these transactions, said:

"If it be said that *no officer* of the Albion bank *knew* of these deposits *except Warner, the wrong-doer*, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the *reply* is that the *other officers and directors* of the Albion bank were *chargeable with knowledge of these deposits.* If, through their *negligence*, they did not *in fact know*, that is a matter for which the *Albion bank* and *not the defendants*, were responsible. Kissam, Whitney & Co. had no *supervision over its affairs, no knowledge as to how those affairs were managed.* They were not called upon to *go to Albion and hunt up the various officers and directors, and inform them, one by one, personally*, that these moneys had been deposited to their credit in the Third national bank. It was enough that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion bank that it received and held those moneys." (Italics ours.)

See also: *Sun Print. & Pub. Co. vs. Moore*, 183 U. S., p. 642.

III.

D. The plaintiff below ratified the contract by bringing this action for the purchase price, as fixed by the contract, and also by continuing to maintain and prosecute this suit, with knowledge of the terms of the contract in regard to the stock.

Plaintiff, having sued for the contract price of the cotton, has thereby ratified the contract irrevocably, and can recover only in accordance with its terms.

Assuimng, for the sake of argument, that the plaintiff was not bound by the contract of W. L. Wells to take the shares of stock in the Loray mills in part payment of the purchase price of the cotton, either one of two courses was open to the plaintiff:

It could either have repudiated the contract altogether, when informed of its terms, or it could have ratified it.

Ratification could be made in this case in either one of the two ways:

1. By recognition of the contract as a whole, as shown by receiving and retaining benefits under it, or by silence and acquiescence after notice of its terms. This has already been considered.

2. By recognition of the contract, as shown by suing for the purchase price or any part thereof, or, in other words, by electing to sue on the contract and not merely for the value of the cotton.

If the plaintiff intended to repudiate the contract, the suit should have been brought in trover for the value of the cotton, but the plaintiff, having elected to sue for the price of the cotton or the balance of the price alleged to be due, it thereby ratified the contract of sale as much so as if it had

expressly and fully accepted its terms and recognized it as binding in all respects.

Or, to state the proposition somewhat differently:

The plaintiff having sued upon the express or special contract for the purchase price of the cotton, is bound by that contract and every part thereof, and cannot recover on a part and repudiate the other part. It must recover only in strict accordance with the very terms of the contract, and will not be allowed to recover for the value of the cotton, as upon an implied promise to pay for the same, or in trover for the commission.

The suit having been brought upon the special contract for the price fixed by it or a part of such price, the plaintiff below, W. L. Wells Company, thereby ratified the contract and is as much bound by its terms as if it had originally given express authority to make it, and in this view, it can make no difference what the terms of the contract were.

An apt and striking illustration of this doctrine of ratification by bringing suit is found in the case of GAINES vs. MILLER.

In that case, it appeared that Daniel Clark executed a will in 1811, and, in July, 1813, he executed another will, which revoked his former will, and, in August, 1813, Richard Relf and Beverly Chew wrongfully assumed to act as executors of his estate, under the will of 1811, and, by power of attorney, appointed one Hammond to sell certain land of Daniel Clark in the State of Missouri. Hammond sold the land in 1819, for $6,841.80, and, failing to account for the proceeds, Relf and Chew sued him and recovered judgment for that amount in August, 1819. In October, 1823, an execution issued on this judgment and was levied on land belonging to Hammond, which was sold thereunder for $427.77, and this amount was credited on judgment. Mrs. Myra Clark Gaines, discovering afterwards, that she was the child of Daniel Clark and the general devisee and legatee under his will of 1813, caused the same, after long

litigation, to be admitted to probate in 1856. Hammond having died in the meantime, plaintiff, Mrs. Gaines, sued his administrator in equity to recover the proceeds of the sale of the land ($6,841.80) which were received by Hammond in 1819, acknowledging the transaction between him and Relf and Chew, as executors *de son tort*, and Hammond. Defendant demurred to the bill.

The Supreme Court of the United States held that, as plaintiff had brought a suit against Hammond's administrator for the proceeds of the sale of land, she thereby ratified all that had taken place between Relf and Chew, as executors *de son tort*, and Hammond, as attorney, in the proceedings against him to recover the proceeds of the sale of the land. The court further held that, because of this ratification, growing out of the suit for the proceeds of the sale, the plaintiff could not recover the said proceeds, as the cause of the action for the same had been merged in the judgment recovered by Relf & Chew *vs.* Hammond, and the judgment could be enforced only by execution or other final process or being a new *causa litis* by a suit thereon, and that no suit or action could be maintained for the proceeds, and that, as the judgment of Relf and Chew against Hammond, by the law of Missouri, was conclusively presumed to have been paid, on account of the lapse of time, the plaintiff's right to recover, even upon that, had been lost. The demurrer was sustained and her bill dismissed.

Gaines vs. Miller, 111 U. S., 395.

The case of Gaines *vs.* Miller, we submit, is direct authority in our case, for the position that plaintiff, Wells Company, has ratified the contract of W. L. Wells with the defendants by suing for the purchase price of the cotton, one of the consequences of such ratification being that the plaintiff cannot repudiate anything that was done by W. L. Wells, but must abide by his acts, and can recover only in accordance with the contracts as made by him.

In the case of Robb *vs.* Voss, 155 U. S., 13, the court discussed this question at length, and, in the course of the opinion delivered by Justice Shiras, used the following language:

"The defense of waiver arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract of sale of property. In such case, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

In our case, the plaintiff has not only sued for the price fixed by the special contract and thereby recognized and ratified the latter, but, since the defense of payment was pleaded in the answer and after a full disclosure of the facts by the defendant, the plaintiff has persisted in suing upon the special contract for the price of the cotton and has actually recovered judgment for the same, which it is now seeking to maintain and enforce. A more unequivocal and emphatic act of ratification could not be imagined.

See, also, the following cases:

Singleton vs. Bank, 38 S. E. Rep., 947.

Johnston vs. Imp. Co., 68 N. W. Rep., 383.

"Where an agent sells the goods of his principal at an agreed price, to be paid for in services to be rendered to the agent by the purchaser, and the principal, with the full knowledge of the facts, sues the purchaser in assumpsit for

the price agreed, he thereby affirms the contract of his agent, both as to the sale and the mode of paying the price. In such case the principal might repudiate the entire contract and recover the goods in an action of replevin or their value in an action of trover, but he cannot adopt the contract in part without adopting it wholly."

Shoninger vs. Peabody, 14 Am. St. Rep., 88.

It will be seen in paragraph 2 of the complaint, pages 3 and 4, of the printed record, it is alleged, that *the plaintiff, the W. L. Wells Company, corporation, sold and delivered to the defendant so many bales of cotton "for which the defendant agreed to pay the plaintiff" such a sum, etc.*

Here is one allegation by the plaintiff, corporation, of an express special contract on the part of defendant to pay so much money, such a sum, THE SUM AGREED ON.

The declaration, then, in the language of the law, is upon a special contract so laid in the complaint. It is not for the value of the goods in assumpsit upon a *quantum valebat*, which is always an implied contract to pay the value of goods delivered, the same to be assessed by a jury upon inquiry. It is an agreement to pay an exact sum for such a number of pounds of cotton already ascertained so that if there had been no answer filed, the judgment could have been entered, without inquiry, *for that exact sum.*

If the contract sued on had been an implied contract to pay so much as the goods are worth, the value of the same to be ascertained by a jury, the judgment for want of answer would have been by default and inquiry, and not a final judgment by default, as here. The distinction is clear between the two, the express and the implied contract.

In the face of this declaration, upon this express special contract, it is contended by the plaintiff, and so held by the court, on the circuit, that the plaintiff is not estopped to say there was no power to make this contract. The plaintiff *alleges* that it, the corporation, made the contract, which

it had no power, it is contended, to make. This is the proposition, the contention.

We maintain that the plaintiff, having sued upon the contract, the express contract, and not on a *quantum valebat*, the implied contract, can recover only on the contract, as alleged and proved, and is bound by its terms.

We are confident that no case can be found in the books contradictory of this principle.

In this connection it is important to inquire as to who made the contract; by, and through whom, was the contract sued upon, made? It was made by W. L. Wells, as testified to by the witnesses, and as shown by the correspondence between the parties, and as testified to by Love in the presence of W. L. Wells, the president of the company and manager, and, indeed, the only person in the company who was solvent, a man who, according to all the evidence, could make and unmake, take in, or turn out, at will, any member, of the firm, copartnership, or corporation.

We say, in the presence of W. L. Wells, because he was present at the trial, summoned as a witness, but not put on the stand to contradict one word, one thing testified to by John Love: The evidence shows that W. L. Wells was really the company and the company W. L. Wells. 95 Fed. Rep., 27; 13 Fed., 811, and 83 Fed., 556.

This contract was made by W. L. Wells, for the company and a part of it was, that fifty thousand dollars of the purchase-money, to be paid, on the contract, was to be in stock of the Loray mills.

The evidence to support this was the testimony of Love, the letters of Wells, the ratifications of, and acquiescence in, the same, by the company in Mississippi. Every dollar was paid in pursuance of and compliance with the contract as shown by *record evidence produced in court*, supported by the testimony of John Love, as we again submit, in the presence of W. L. Wells, who did not contradict a word he said, or deny a payment, as entered upon the books.

The principle of law above stated, to the effect that the plaintiff having sued on the contract, the express contract, and not on a *quantum valebat*, or implied contract, can recover only upon the express contract alleged in the complaint, is so well settled we hardly deem it necessary to cite other cases to sustain it, but in addition to the case already cited of Shonenger *vs.* Peabody, 14 Amer. State Rep., 88, and cases cited therein, we refer to the following cases:

See:

Washington, &c., P. Co. vs. Sickles, 10 Howard, 419.
School Fur. Co. vs. School Dist. (Neb.), 77 N. W., 72.
Johnston vs. Imp. Co. (Neb.), 68 N. W., 383.
Nat. Bank vs. Bank (Neb.), 80 N. W., 48.
Leavitt vs. Fairbanks (Me.), 43 Atl., 115.
Martin vs. Humphrey (Neb.), 78 N. W., 383.
Edgar vs. Breck (Mass.), 52 N. E., 1083.
Owens vs. Boyd Land Co. (Va.), 28 S. E., 950.
Evarts vs. Selover (Mich.), 7 N. W., 225.
Wheeler & Wilson vs. Aughey (Pa.), 22 Atl., 667.
4 *Thompson Corp.*, sec. 5303.
5 *Thompson Corp.*, secs. 6016, 6017, 6018.
Singleton vs. Bank (Ga.), 38 S. E., 947.
Landin vs. Bank (Minn.), 77 N. W., 35.
Rudasill vs. Falls, 92 N. C., 222.

In the last cited case, the principle herein contended for is clearly stated as follows:

"Where an agent exceeds his authority, his principal must either wholly ratify or wholly repudiate the transaction. He cannot ratify that portion of the contract which is beneficial to him and repudiate the remainder."

The plaintiff is bound by the allegation in the complaint. If so bound by it, how can it be contended that he had no power to make it?

The absurdity of the contention, we respectfully submit is shown in the statement, or the allegation, in the com-

plaint, that the contract was entered into between the plaintiff and defendant, and a recovery upon the same asked by the plaintiff; and, at the same time, and in the light of the same, the contention that there was no such contract, for the reason that plaintiff had no power to make it.

There is another proposition contended for here, that, we submit, is peculiar; and that is, as said by the court, in the opinion filed, that fact, that the defendant had dealings with the company estops it from denying its corporate existence; and, at the same time, maintaining that these same dealings, estopping, as they do, the defendant, do not estop the plaintiff in denying its power to make this contract. This, too, in the face of the fact that the action is based on the contract. There is, we most respectfully submit, no escape from the rule that if these dealings estop one they must the other.

Building & Loan Ass'n vs. Ebaugh, 185 U. S. Rep., 114.

The plaintiff's election thus to sue and to ratify the special contract, having once been made, cannot be recalled.

Rowland vs. Barnes, 81 N. C., 234.

Austin vs. Stewart, 126 N. C., 525.

IV.

The judge had no power or right to withdraw the consideration of the case from the jury and peremptorily to direct a verdict, in view of the evidence submitted in the case, even under the practice prevailing in the Federal courts. The evidence more than reasonably tended to establish the plea of payment, or the defense, as to credit for the stock subscription, and should have been submitted to the jury.

This question is raised by the sixth exception to the rulings of the court, the substance of which is that the court erred in the instruction to the jury that there was no evidence reasonably sufficient to establish the fact of payment,

by the defendant, of fifty thousand dollars, or any other sum, for the stock of the Loray mills, as alleged in the answer, for and in behalf of the plaintiff, W. L. Wells Company.

Where there are presented, by the testimony, matters of fact, vital to the controversy, upon which either party has the right to the opinion of the jury, it is error for the court to withdraw the case from the jury and direct a verdict for the other party.

Russell vs. Post, 138 U. S., 425.

When the evidence, or any inference that can be reasonably drawn therefrom, reasonably tends to establish the claim or defense, it is not within the province of the court to withdraw the case from the jury, but the evidence should be submitted to the jury to ascertain the facts of the case upon which the claim or defense is based.

Humiston vs. Wood, 124 U. S., 12.
R. R. vs. Powers, 149 U. S., 43.
Pythias K'ts vs. Beck, 181 U. S., 49.

We respectfully submit that the foregoing will show the writ of certiorari, as applied for in this case, should not be granted.

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MAY 2, 1904.